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Terrorism threats and temporary exclusion orders: counter-terror rhetoric or reality?

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Abstract

Key words: temporary exclusion orders, ISIS, counter-terrorism, ECHR, control orders

Western democracies are currently facing a terrorist threat which comes mainly from their own Salafist-jihadi supporting citizens. In evaluating the threat there is at present a particular focus on nationals who have travelled abroad to support ISIS, or similar groups, and may return (often referred to as “foreign terrorist fighters”), especially given that ISIS-held territory is likely to continue to shrink in 2017 and beyond. Exploration of measures to combat this threat is ongoing in a number of democracies, and in the UK led to the introduction in 2015 of temporary exclusion orders (TEOs), under the Counter-Terrorism and Security Act 2015. The thinking behind TEOs bears some conceptual resemblance to that behind measures introduced in the UK and other democracies to strip dual national suspects of citizenship, and even - in terms of seeking to place TEO-subjects outside the UK’s ECHR jurisdictional responsibility - to that underlying creation of CIA “dark sites”. The orders represent the latest manifestation of liberty-invading non-trial-based executive measures introduced post-9/11 in the UK; therefore, as would be expected, they are in tension with domestic and international human rights law. This article will argue that the basis put to Parliament by the government for creating a reconciliation between such law and reliance on the orders is flawed, which may partly explain the marked reluctance to deploy them in practice, even in the face of the currently increased threat from returnee foreign terrorist fighters. It will therefore consider the relevance, if any, of TEOs to that threat and their role in the global struggle against terrorism. It will question why, against the backdrop of the current, increasing ISIS-linked threat, the UK has saddled itself with another counterterrorism power that appears to sit on the books and perform no clear role, another power owing more to counter-terror rhetoric than to enhancing security.

Introduction

The post-9/11 years have seen a struggle in the UK and elsewhere to reconcile human rights norms with reliance on non-trial-based counter-terror measures,¹ a struggle that is exacerbated since the terrorism threat currently faced by Western democracies comes mainly from their own citizens² who cannot be deported, if mono-nationals. That has led, as will be discussed, to a global proliferation of citizenship-deprivation measures. In the years 2014-17 the threat has been found to come in part from nationals who have travelled abroad to fight or train with ISIS, or similar groups, and then seek to return,³ a threat that may increase as ISIS-held territory continues to diminish in 2017 and beyond. The threat from British returnees as one group of “foreign terrorist fighters” (FTFs), while far from the only form of terrorism threatening the UK,⁴ was credited with triggering the introduction of a new non-trial-based measure in the Counter-Terrorism and Security Act 2015 (CTSA) Part 1 Chapter 2 – temporary exclusion orders (TEOs). TEOs borrow a number of features from control orders and Terrorism Prevention and Investigation Measures (TPIMs)⁵ as non-trial-based executive measures. They are imposed by the Home Secretary, with subsequent court review, on a low standard of proof, and enable individuals to be subjected to significant restrictions on liberty.

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¹ See *Global Anti-Terrorism Law and Policy*, 2nd edn (eds V Ramraj, M Hor, K Roach, G Williams) (Cambridge: Cambridge University Press, 2011), chaps 6,9,18,20,21.

² See: H Summers “UK faces terror threat from Isis ‘not seen since IRA bombings’” *The Guardian*, 26.2.17: Max Hill QC, the new Independent Reviewer of Terrorism Legislation, “expressed fears about the imminent return of hundreds of British jihadis who have been fighting for Isis in Syria” (<https://www.theguardian.com/uk-news/2017/feb/26/isis-uk-faces-terror-threat-not-seen-since-ira-bombings> [last accessed 20.4.17]). E MacAskill and P Johnson “There will be terrorist attacks in Britain” *The Guardian* 1.11.16, interview with Andrew Parker, current Head of MI5: “there are about 3,000 “violent Islamic extremists in the UK, mostly British” (<https://www.theguardian.com/uk-news/2016/nov/01/andrew-parker-mi5-director-general-there-will-be-terrorist-attacks-in-britain-exclusive> [last accessed 20.4.17]). The attacks in January 2015 on *Charlie Hebdo*, at a kosher supermarket, and the Paris terrorist attacks in November 2015 were organised and perpetrated largely by ISIS-supporters, some of whom had fought with ISIS, and almost all of whom were French nationals: see B Farmer, “What we know about the suspects” *The Telegraph* 18 March 2016. The Brussels terrorist strike on 22.3.16, the deadliest act of terrorism in Belgium’s history, was perpetrated by at least 3 Belgian nationals: see BBC News 9.4.16: “Brussels explosions: What we know about airport and metro attacks”. The Normandy church attack, 26.7.16, was perpetrated by French citizens, the Nice truck attack by Lahouaiej-Bouhlel on 14.7.16, who had a French residency permit, the Westminster attack by Khalid Masood, a British citizen, on 22.3.17, also used a vehicle against pedestrians. Far-right extremists presenting a threat also tend to be ‘home-grown’: see “Countering Lone-Actor Terrorism Series, a joint report by experts”, the Royal United Services Institute, Chatham House, the Institute for Strategic Dialogue and the University of Leiden (2015).

³ Max Hill, 2017, *ibid*; see also note 25.

⁴ See: the references to Northern Irish and extreme right wing terrorism in “The Terrorism Acts in 2014: Report of the Independent Reviewer” September 2015, especially paras 2.17 and 2.19; Charles Anthony “There are far-right wannabe terrorists in the UK”, *The Independent* 24.11.16. But the threat appears not to be as great as that from Islamic groups: David Anderson QC, the former independent reviewer of terrorism legislation, “The Terrorism Acts in 2015”, December 2016, paras 2.24, 2.25.

⁵ Under the Terrorism Prevention and Investigation Measures Act 2011, as amended by CTSA 2015 Part 2.

But while, as explored below, TEOs are *more* likely to create tensions with human rights norms than TPIMs, they have been presented as reconcilable with such norms, not centrally through recalibrations of human rights as was necessitated by control orders,⁶ or by means of a derogation,⁷ but on the basis that excluding TEO subjects from the UK places them, for a period, outside the UK's European Convention on Human Rights or ICCPR jurisdictional competence.

The thinking behind TEOs bears some conceptual resemblance to that behind measures introduced in the UK and other democracies to strip nationals of citizenship, and even - in terms of seeking to place TEO-subjects outside the UK's ECHR jurisdictional responsibility - to that underlying creation of CIA "dark sites". (The US government took the stance that the usual human rights' constraints did not apply to such sites since they were off-shore; in somewhat similar vein, the UK government considers that such constraints, in the form of obligations of the UK, are inapplicable, since TEO-subjects are for a time outside UK territory.) But unlike the reliance on such measures to counter terrorism, TEOs have not yet been deployed, despite their apparent connection with averting a current threat from ISIS-supporting returnees. So it will be argued that, despite the UK's stance as to jurisdictional competence, the ECHR via the Human Rights Act 1998 (HRA) may have created a stronger inhibitory impact on their use than it already had done on control orders, and then on TPIMs.⁸ This article will therefore contend that concern as to their possible ECHR and ICCPR implications, combined with the practical problems of utilising them,⁹ means that introduction of TEOs as new executive liberty-invading measures appears to owe more to counter-terror rhetoric than to an expectation that they will be of practical utility. It therefore considers their role in the global struggle against terrorism, and asks why, in the face of the

⁶ The early 'heavy touch' control orders under the Prevention of Terrorism Act 2005 (see *Secretary of State for the Home Department v JJ* [2007] 3 WLR 642) appeared to demand a minimising reinterpretation of certain rights, in particular Article 5, in effect emptying the right of part of its content or implying new exceptions into it. In 2009 a Report on global terrorism of the International Commission of Jurists Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights, *Assessing Damage, Urging Action* (Geneva, ICJ, 2009) identified this trend in the UK and other countries in the face of terrorism. See further Helen Fenwick, "Recalibrating ECHR rights, and the role of the Human Rights Act post-9/11: reasserting international human rights norms in the 'war on terror'?" (2011) 63 Current Legal Problems 153.

⁷ In a well-known episode, reliance on indefinite detention without trial for non-citizens (under the Anti-Terrorism, Crime and Security Act 2001, Part 4) and human rights law was sought via use of a derogation under Article 15, from the right to liberty under Article 5 ECHR. That reconciliation failed when the derogation order was struck down by the House of Lords: *A and Others v Secretary of State for the Home Dept* (2004) UKHL 56.

⁸ See below note 191.

⁹ Since identifying and intercepting a suspect seeking to return is likely to prove problematic due to the various routes to return that could be used.

current and possibly increasing threat posed by FTFs, the UK has ended up with another counterterrorism power that appears merely to sit on the books, another counterterrorism power owing more to ‘security theatre’ than to enhancing security.¹⁰

The threat from FTFs and the desirability of excluding terrorist suspects from their home state

The threat posed by ISIS-supporters

The justification for introducing TEOs rests in part on the threat currently posed to Europe and globally by ISIS and its supporters, which appears to be of a greater order of magnitude than the one posed by Al-Qaeda and linked groups, although persons returning from, for example, Pakistan who may have trained there with such groups may also present a threat (and would also be covered by the TEO scheme).¹¹ The fact that at present ISIS still controls territory means that it provides physical bases that those in the UK and elsewhere attracted by its Salafist-jihadi ideology can travel to,¹² although the numbers travelling diminished in 2015-17;¹³ it can provide bases for weapons training, for inducting children into its violent ideology, and for sending out trained persons to mount attacks in Europe and globally.¹⁴

¹⁰ Any rhetorical function of TEOs recalls Bruce Schneier’s idea that some counter-terror measures may make people feel more secure without having any real function in increasing security; see “Beyond Security Theater” *New Internationalist* November 2009. See note 193 and associated text for further examples of such measures.

¹¹ Evidence to the Foreign Affairs Committee, *Global Security: Afghanistan and Pakistan*, Session 08-09, 21.7.09 (S Langan, answer to Q41) was to the effect that Pakistan militant groups, which “were initially configured to fight in that region, have signed up to the global jihad”. For example, Lashkar-e-Taiba, held largely responsible for the Mumbai attacks, was found to have tapped into the logistical ability and capability of al-Qaeda.

¹² Estimates for the total number of foreign fighters with Sunni terrorist groups in Iraq and Syria are around 15,000 from 80 countries – 3,000 to 5,000 with Jabhat al-Nusra and 7,000 to 10,000 with ISIS/ISIL; 3,850 fighters are estimated to be from Europe: figures from “At high-level debate, UN, Security Council renew pledge to counter foreign terrorist fighters”, UN press release, 19.11.14, quoted in “Counter-Terrorism and Security Bill” No 127 of 2014-15 Research Paper 14/63 27.11.14. David Anderson found in December 2016: “The Paris attacks of November 2015 and the Brussels bombings of March 2016 demonstrate that former Daesh fighters have formed organised cells, infiltrated Europe and have the capacity – even as Daesh loses territory in its Iraqi and Syrian heartlands – to wreak havoc and destruction [in Europe]” (“The Terrorism Acts in 2015”, para 2.7).

¹³ Ibid, Anderson Report, 2016, at 101, C Walker, Annex 2, para 6.

¹⁴ *Changes to Modus Operandi of Islamic State Revisited* Europol November 2016, section 5: “Intelligence suggests, however, that IS has also put together teams in Syria which are sent to the EU tasked with carrying out attacks”.

It should not be assumed, however, that all persons who have left Britain to travel to territory held by ISIS or linked groups would pose a risk to the UK if they return. Having witnessed the barbarities of ISIS or other similar groups, some returnees may have rejected their ideology and may have managed to escape with great difficulty from ISIS-held territory.¹⁵ Hegghammer has pointed out that not all extremist Sunni clerics support out-of-theatre attacks in the West;¹⁶ but while such attacks are not necessarily typical of Islamic militancy world-wide, ISIS leaders have strongly and consistently supported them;¹⁷ ISIS has repeatedly urged its supporters “to kill disbelievers in the West”.¹⁸ Given that ISIS recently lost, and is still losing, a significant amount of territory,¹⁹ its ability to portray itself as a state is currently diminishing. But that may merely mean, given that “the caliphate” is made up partly of FTFs, that the nature of the threat its surviving fighters and supporters pose will shift as they disperse to various states, although its loss of prestige may also affect

¹⁵ See The Home Affairs Committee, Seventeenth Report of Session 2013-14, Counter-terrorism, HC 231, at paras 48-51. Samra Kesinovic, 18, was reportedly murdered by Islamic State fighters when she tried to leave ISIS-held territory to return to Austria: Chris Perez: “Austrian Jihadi bride beaten to death after trying to escape ISIS” *New York Post*, 24.11.15.

¹⁶ “Abdallah Azzam, the influential Palestinian cleric described as ‘the mentor of Usama bin Ladin’, never called for nor organized any out-of-theater attacks during his eight years of fighting the Soviets in Afghanistan in the 1980s”: Thomas Hegghammer, “The Rise of Muslim Foreign Fighters: Islam and the Globalization of Jihad”, (2011) 35(3) *International Security* 53–94.

¹⁷ “Among the Islamist terrorist organisations known to EU law enforcement agencies, ISIS is one of the few that explicitly targets Western countries”: the Europol Report, *supra* note 14, section 2. Islamist extremists have inspired the overwhelming majority of over 40 terrorist plots which have been disrupted since the London bombings of 2005 (Counter-extremism strategy 2015, Command Paper Cm 9148, October 2015, para 5). ISIS claimed responsibility for the Paris attacks of 13.11.15: see: “ISIS claims responsibility for Paris attacks, calling them miracles” *the New York Times* 14.11.15 (<http://www.nytimes.com/2015/11/15/world/europe/isis-claims-responsibility-for-paris-attacks-calling-them-miracles> [last accessed 20.4.17]). Europol records the thwarting in France, in 2014, of “at least two attack plots involving individuals that had returned from Syria”, and arrests for attack planning in Austria, Italy and the Netherlands: TE-SAT Terrorism situation and trend report, 2015, at 2.1. See a study of ISIS-related attack plots in Western Europe, North America and Australia 2011-June 2015, Thomas Hegghammer and P. Nesser, “Assessing the Islamic State’s commitment to attacking the West”, (2015) *Perspectives on Terrorism*, vol 9 no. 4, (the Terrorism Research Initiative), which concluded that there had been “more plots involving only IS sympathisers than returned foreign fighters” but that “the organisation’s formidable resources and verbal hints at future attacks give reason for vigilance”; “The Terrorism Acts in 2014: the Report of the Independent Reviewer” September 2015, para 2.12.

¹⁸ Y Bayoumy “Isis urges more attacks on Western ‘disbelievers’”, *the Independent* 22.9.14, reporting that ISIS spokesperson Abu Muhammad Al Adnani issued a fatwa in 2014 to followers to “rise up against Westerners and rig the roads with explosives for them....Raid their homes. Cut off their heads”. David Anderson (*ibid*, 2015) has noted: “Through media outputs, ISIL has inspired the increase in unsophisticated but potentially deadly attack methodologies...seen recently in Australia, France, Canada, Denmark and the USA”, para 2.11.

¹⁹ ISIS (Daesh) is at present predominantly based in Syria and Iraq, but its territory in those states has diminished significantly (by about 30%) due to military action since ISIS spokesperson Abu Muhammad al-Adnani declared in June 2014 that it had established an Islamic caliphate, with its leader, Abu Bakr al-Baghdadi, the self-proclaimed Caliph Ibrahim (see Counter-extremism strategy, Cm 9148, October 2015, 22). See also B Powell, “As Isis’s caliphate crumbles, jihadi tactics are evolving”, *the Independent*, 23.10.16. A report by IHS conflict monitor “Islamic State Caliphate shrinks by 16% in 2016”, 9.10.16, found that ISIS had lost about 16% of the territory it held in January 2016, and overall had lost just over a quarter of the territory it had controlled in January 2015.

recruitment. The expected eventual military destruction of the “caliphate” is therefore likely to lead to an increase in the number of would-be returnees who have become more intensely radicalised and have experienced weapons training.²⁰ It has been found that militants usually “do not leave intending to return for a domestic attack, but a small minority acquire that motivation along the way and become more effective operatives on their return”.²¹

So the terrorist threat in Britain appears to come partly from nationals who have travelled abroad to support ISIS, and may return,²² although the fact of leaving to do so is far from the only indicator that an ISIS-supporter poses a risk.²³ Of those ISIS-supporters (or supporters of similar groups) who left the UK for Syria or Iraq,²⁴ about half have already returned,²⁵ meaning that quite a large number, who survive the conflict, are likely in future to seek to do so.

TEOs as a compromise response to the FTF threat

The designation of the terror threat level in the UK was raised from substantial to severe in 2014,²⁶ and in that year, in the wake of atrocities committed by ISIS, and in response to fears that returnees from fighting with or supporting ISIS would receive training abroad and

²⁰ See: B Powell, *ibid*; Europol Report November 2016 (*supra* note 14).

²¹ Thomas Hegghammer, “Should I stay or should I go?” (2013) 107 *American Political Science Rev* 1,10. Cf Seth Jones, *The Extremist Threat to the U.S. Homeland* (Santa Monica: RAND, 2014); see further J. Skidmore, *Foreign fighter involvement in Syria* (Herzliya: ICT, 2014); Al Qaeda Sanctions Committee, Analysis and Recommendations re the Global Threat from FTFs (New York: S/2015/358, 2015).

²² See note 25. MI5 reported in March 2015 that the number of UK-linked individuals who were involved in or had been exposed to terrorist training and fighting was higher than it had been at any point since the 9/11 attacks in 2001 (see “The Terrorism Acts in 2014: the Report of the Independent Reviewer” September 2015, paras 2.10, 2.13). The Home Affairs Committee (2013-14 Report, para 40) found concurring evidence to the effect that the fact of being a returnee from fighting with ISIS or similar groups was a relatively strong predictor of likelihood of taking part in terrorist plots: “Hegghammer found that on average, one-in-nine FTFs returned home to take part in a domestic terror plot...plots with foreign fighters are more likely to reach fruition and twice as likely to have a lethal impact...a one-in-nine radicalisation rate would make foreign fighter experience one of the strongest [known] predictors of individual involvement in domestic operations”.

²³ *Supra* note 17.

²⁴ The International Centre for the Study of Radicalisation estimated in 2015 that about 500-600 UK citizens had left to support ISIS in Syria/Iraq: Report 26.1.15. (But see now note 25). See also “CONTEST: Annual Report for 2014”, (Cm 9048, March 2015), which *inter alia* made reference to people with extremist connections who had travelled to Syria and Iraq, some of whom have combat experience and terrorist-related training. It also referred to ‘the continued threat from al-Qaida core, al-Qaida in the Arabian Peninsula and al Shabaab’.

²⁵ The terrorist threat was summarised in “CONTEST: Annual Report for 2015” Cm 9310 July 2016, which referred (para 1.4) to about 850 persons who had travelled to Syria and Iraq, of whom about half had returned.

²⁶ On 29.8.14 (see MI5 Press Release “Threat level to the UK from international terrorism raised to severe”).

would seek to mount terror attacks in Britain²⁷ or Europe or radicalise others, the then Prime Minister, David Cameron, announced that the government would bring forward a “discretionary power to allow us to exclude British nationals from the UK”.²⁸ At the time the UK was already able to deprive suspect dual nationals, *or* those with the potential ability to acquire another nationality, of citizenship, thereby permanently excluding them from the UK.²⁹ The Prime Minister was therefore - it must be assumed - referring mainly to suspect “mono-nationals”, taking that term to refer to non-dual nationals and those nationals without that potential ability (that is also the sense, for brevity, in which this term will be used below). Provision therefore was to be included in the Counter-Terrorism and Security Bill to strip persons who had gone to fight with or support ISIS of citizenship, even if they were born in Britain and mono-nationals.³⁰ The rationale, clearly, was that some of the persons in question had by their actions not only demonstrated an intention to renounce their citizenship,³¹ but had supported ISIS’s murder of British citizens abroad,³² and had sought via social media to encourage others to leave to support ISIS,³³ or to commit acts of terror in Britain. But proposals to revoke citizenship became mired in conflict between the Conservative leadership and the Liberal Democrats while they were in coalition,³⁴ and the legality of so doing was in doubt. The introduction of provision to strip British mono-nationals of citizenship if they have gone abroad to support ISIS or similar groups has not been pursued: even when, after the 2015 General Election, the new Conservative government was freer to consider taking that step, it did not seek to do so.³⁵

²⁷ Theresa May (second reading, House of Commons, 2.12.14 Col. 207): “We face the very serious prospect that British nationals who have fought with terrorist groups in Syria and Iraq will seek to radicalise others, or carry out attacks here. We have already seen the appalling murder of four civilians outside the Jewish Museum in Brussels, and the recent attack on the Canadian Parliament was a shocking reminder that we are all targets for these terrorist organisations”.

²⁸ Hansard 1.9.14: Column 26. Official Report: Vol. 585, c.26.

²⁹ See note 115 and associated text.

³⁰ Consideration of the practicality of withdrawal of citizenship was recommended by the Home Affairs Committee “Counter-terrorism Seventeenth Report”, HC 231, 30.4.14, paras 96-100.

³¹ E.g. they had torn up their passports in ISIS propaganda videos posted on Youtube.

³² E.g. the beheading of Alan Henning: see “Alan Henning killed by Islamic State” BBC News online 4.10.14. The attack in Sousse, Tunisia, claimed by ISIS, on 26.6.15 killed 38 people, 30 of them British.

³³ E.g. Tareena Shakil was convicted of ISIS membership and of encouraging acts of terror on social media (under s 1 Terrorism Act (TA) 2006): BBC News online 29.1.16.

³⁴ See Patrick Wintour “Cameron shelves move to ban jihadists coming to UK” *the Guardian*, 1.9.14; Jon Craig “Doubts about legality of snatching passports” Sky News, 1.9.14.

³⁵ For clarity – the reference is to mono-nationals who are *not* covered by the British Nationality Act 1981 s40(4A). See note 114, below.

The introduction of TEOs thus represented a compromise: that original proposal from David Cameron as to permanent exclusion of FTFs from the UK – citizenship-stripping – was dropped. Nevertheless, the Bill still placed an emphasis on the exclusion of suspect nationals from the UK, albeit on a temporary basis. The aims underlying the Bill then underwent a further reconceptualization during the Parliamentary process: the emphasis on such exclusion was largely replaced by an emphasis on managing the TEO subject’s return under the scheme now created by CTSA 2015 Part 1 Chapter 2.³⁶ Management of the return now appears to be the primary aim of the scheme, as enacted, although not as originally proposed.³⁷ But remnants of its exclusion element remain – partly, it is suggested, as a face-saving and popularity-seeking exercise to obscure the doubtful basis for the then Prime Minister’s original hasty pledge. But other aims may have been at play, as discussed below, possibly reminiscent of those underlying the creation of CIA “dark sites”.³⁸ TEOs enable the suspect to be prevented from returning to the UK for a period until a “permit to return” can be issued, specifying the manner and timing of the return, or until he or she agrees to an interview abroad; the orders can also make provision for managing the risk he or she may pose on return. No ultimate time limit on the full period of exclusion from the UK is specified.

TEOs and the global threat from terrorism

The TEO scheme therefore relies on the highly questionable notion that another state might take responsibility for a period for British terrorist suspects who could be received back into the UK. That stance could be seen as reneging on Britain’s responsibility as part of the international community to combat terrorism in general; TEOs appear to represent an attempt to protect Britain in a unilateral sense, rather than acting as part of an international struggle against terrorism. The temporary exclusion of its own nationals could also put Britain as the excluding state in breach of its international law obligations to other States, and

³⁶ In the Home Affairs Committee “Counter-terrorism: Seventeenth Report”, HC 231, 30.4.14, para 98 et seq, government proposals for removing British citizenship from foreign terror suspects, leaving them stateless (by Clause 18 Immigration Bill 2014), were considered; however, the plans were criticised for being reactive policy-making (para 101) and the House of Lords rejected the amendment (HL Deb, Vol 753, Col 1167, 7 April 2014). The Home Affairs Committee further observed that it would still be necessary to find a state willing to receive the suspects, limiting the utility of such a measure (para 101). See also note 37.

³⁷ Annex 2 to David Anderson’s 2016 Report, by Professor Clive Walker, argued that “the measures [in the form in which they emerged in CTSA] now embody a mode of regulated re-entry and residence rather than some variant of exile”, December 2016 Report (*supra* note 12), para 20(d).

³⁸ See Johan Steyn “Guantanamo Bay: The Legal Black Hole” (2004) Vol. 53(1) International and Comparative Law Quarterly 1-15. See also notes 163 and 164.

of positive obligations imposed on states by UN Security Council resolutions in relation to terrorism.³⁹ The Security Council recently called on member states to tackle the problem represented by terrorist groups operating in Iraq and Syria. It said that member states should: “...prevent and suppress the recruiting, organizing, transporting or equipping of individuals who travel to a State other than their State of residence or nationality for the purpose of the perpetration, planning or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, and the financing of their travel and of their activities...”. It went on to stress: “the particular and urgent need to implement this resolution with respect to those foreign terrorist fighters who are associated with ISIL, Al-Nusrah Front and other cells, affiliates, splinter groups or derivatives of Al-Qaida...”.⁴⁰ However, this resolution did *not* cover excluding returning fighters from their state of nationality, even on a temporary basis. So the “managed return” and domestic monitoring aspects of TEOs cohere with this call, but not the temporary exclusion aspect. The same strictures were also captured in the draft Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism, but while its intention is *inter alia* that travelling to support terrorism should be criminalised, again temporary exclusion from a state is not covered.⁴¹ The introduction of TEOs could also raise concerns as to the propriety of the global struggle against terrorism since it could result in violations of the ICCPR and ECHR, and doubts as to the claimed jurisdictional competence of the UK in respect of those Treaties, as discussed below.

Security, travel restrictions and citizenship deprivation globally

The idea that the geographical location of a terrorist suspect has relevance to national security is not confined to the UK. Reliance on citizenship deprivation to protect security,⁴² and of measures restricting travel to limit the mobility of terrorist suspects (supported, as

³⁹ See the Joint Committee on Human Rights Report “Legislative Scrutiny Counter-Terrorism and Security Bill” 5th Report of Session 2014-2015, HL Paper 86, HC 859; Professor Goodwin-Gill said, “a State which excludes its own nationals is resorting to a unilateralism which is at odds with the collective endeavour of international rights protection as well as internationally agreed efforts to counter terrorism” (paras 3.4, 3.5). See also UN Security Council Resolution 688 of 2014 (S/2014/688).

⁴⁰ UNSCR 2178; Statement by the President of the Security Council S/PRST/2014/23, 19.11.14.

⁴¹ COD-CTE (2015). Representatives of Belgium, Bosnia and Herzegovina, Estonia, France, Germany, Iceland, Italy, Latvia, Luxembourg, Norway, Poland, Slovenia, Spain, Sweden, Switzerland, Turkey, UK, and the EU, signed the Additional Protocol in Riga, Latvia, 22.10.15. It focussed on tackling the problem of “foreign terrorist fighters” and covers intentionally participating in a terrorist group, receiving training for terrorism, travelling abroad for the purpose of terrorism, funding or organising such travel.

⁴² See Lucia Zedner, “Citizenship Deprivation, Security and Human Rights”, (2016) *Journal of Migration and Law* 1-16, 6.

mentioned, by the Security Council), is currently being introduced and explored in a range of democracies. But the introduction of temporary exclusion orders *as well as* citizen deprivation ones has not yet occurred in other Western democracies facing an influx of FTF returnees. France recently contemplated introducing a measure allowing citizenship-stripping even of suspect mono-nationals in the wake of the 2015 Paris attacks, but eventually abandoned the plans,⁴³ although it introduced lesser emergency, derogating, non-trial-based measures.⁴⁴ Australia introduced powers to deprive dual nationals of citizenship on security grounds under the Australian Citizenship Amendment (Allegiance to Australia) Act 2015. In 2014 the Australian Parliament also passed the Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014 which does not include powers to exclude citizens, but created amendments to the Australian Passports Act 2005, including introducing the power to suspend a person's Australian travel documents for fourteen days. A new offence of entering a "declared area" was also created, covering areas in which a terrorist organisation is engaging in hostile activity. Canada has passed legislation allowing the government to deprive dual nationals of citizenship for security reasons under the Strengthening Canadian Citizenship Act 2014. Canada also recently passed the Anti-Terrorism Act 2015; amongst the package of measures introduced was provision to prevent non-citizens who pose a threat from entering and remaining in Canada.

Notoriously, President Trump issued an executive order in January 2017 affecting non-US citizens, restricting travel from seven Muslim majority states for 90 days, which was then struck down by a Federal Appeals court.⁴⁵ It stands out from the other measures mentioned since it was not necessary to be a terrorist suspect to be affected by it. Travel restrictions also

⁴³ The Constitutional Reform Bill came before the French Senate on 10.2.16; a clear majority of MPs in the lower House of Parliament approved the measures, which included removing citizenship from French national convicted terrorists, but they were abandoned on 30.3.16 after criticism from the President's own party.

⁴⁴ France instituted a number of emergency measures (*etat d'urgence*) in 2015 after the Paris attacks accompanied by a derogation under Article 15 ECHR. See: Declaration contained in a Note verbale from the Permanent Representation of France, 24 November 2015, registered at the Secretariat General on 24 November 2015 – Or. Fr. The French Government decided, by Decree No. 2015-1475 of 14.11.15, to apply Law No. 55-385 of 3 April 1955 on the state of emergency. Decrees No. 2015-1475, No. 2015-1476, No. 2015-1478 14.11.15, No. 2015-1493, No. 2015-1494 18.11.15, and Law No. 2015-1501 20.11.15 defined a number of measures that can be taken by the administrative authorities. The state of emergency was extended and renewed again on 15.12.16 for an additional seven months. The expanded emergency powers allow for: reliance on "assigned residence orders" which are similar to control orders; immediate house arrest without authorization from a judge, if persons are considered a risk.

⁴⁵ Trump's executive order was signed on 27.1.17 (see "Donald Trump's Executive Order on Immigration – the full text" *the Guardian* 28.1.17 (<https://www.theguardian.com/us-news/2017/jan/27/donald-trump-executive-order-immigration-full-text> [last accessed 20.4.17]); it was struck down by the 9th Circuit Federal Appeals Court on 9.2.17; at the time of writing a new order is about to be issued.

feature in measures on the control orders model; originating in the UK, they have recently become much more widespread.⁴⁶ So while other democracies have so far stopped short of introducing schemes capable of excluding their own terrorist suspect mono-nationals from the country, even on a temporary basis, measures excluding suspect nationals from their home states and also limiting travel of suspects are proliferating globally.

TEOs: the legal framework

Imposition requirements: imprecise and over-broad

TEOs can be imposed on persons who have a right of abode in the UK, and are abroad,⁴⁷ if the Secretary of State reasonably suspects that the individual is, or has been, involved in terrorism-related activity (TRA) abroad,⁴⁸ and also reasonably considers that it is necessary to impose a TEO for purposes connected with protecting the public in the UK from a risk of ‘terrorism’⁴⁹ as defined in s1(1) of the Terrorism Act 2000 (TA).⁵⁰ It is crucial that the definition of a person reasonably suspected of TRA should be precise since such a person could potentially be subjected to a lengthy period of exclusion from the UK. But the definitions of ‘terrorism’ under s1 TA, on which it is centrally based, and of TRA, are themselves broad and imprecise.⁵¹

⁴⁶ Measures on the control orders model, introduced in the UK in 2005 (*supra* note 6) were then introduced or are about to be in a range of EU states: for example, in Bulgaria under a July 2016 draft Law on Counter-terrorism; France relies on ‘assigned residence orders’ (*supra* note 44); the Netherlands has introduced a draft Bill, the Temporary Administrative Powers Counter-Terrorism Bill (Temporary Powers Bill) 2016, to introduce measures similar to control orders. The German government intends to electronically tag all the people on the country’s terror watchlist (“Germany to Electronically tag all people on terror watch-list” G Chazan, *Financial Times* 1.2.17). Control orders had somewhat similar counterparts in Canada (Security Certificates) and Australia (preventative detention orders in the Criminal Code Act 1995, schedule 1, Anti-Terrorism Act No 2 2005).

⁴⁷ S2(5),(6) Conditions C and D. The right of abode arises under the Immigration Act 1971, s2.

⁴⁸ S2(3), Condition A.

⁴⁹ S2(4) Condition B.

⁵⁰ S14(2) CTSA.

⁵¹ TRA is defined in s14(4) CTSA, echoing the previous definition in TPIMA s4(1) (however, it was narrowed under s20(2) CTSA): the definition now does not cover a person where he/she supports A who encourages B, when it is only B who is involved in the commission, preparation or instigation of an act of terrorism. But s14(4) retains the broad definition. See criticism of the definition of TRA by David Anderson, “Report on the Operation of the Terrorism Act 2000 and Part I of the Terrorism Act 2006”, 1.12.16, para 4.2.

In *R v F*⁵² the Court of Appeal found that the requirement of influencing a “government” in s1 TA was not limited to democratically elected governments – the “apparent nobility” of a terrorist cause in taking action to further democracy against a repressive dictatorship would not mean that those concerned fell outside the definition. When the Supreme Court also looked at the width of s1 in 2013⁵³ it confirmed that finding, while noting that the current definition of terrorism was “concerningly wide”.⁵⁴ S1(1) relies on the relatively quite relaxed standard that the action or threat in question need only be designed to “influence” a government or international organization under s1(1)(b), while dropping even that requirement (or that of intimidating the public) if firearms or explosives are used, under s1(3).⁵⁵ The width of the definition means that while TEOs are aimed at persons who have gone abroad to support ISIS or similar groups that would clearly fall within s1 TA, s2(1), CTSA is clearly over-inclusive as covering at face value a range of persons who have no connection to ISIS and may oppose its ideology. It would cover, for example, a British citizen abroad who supports the PKK and has aided Kurdish groups in Syria fighting ISIS, as well as some groups opposing both the Assad regime *and* Salafist groups in Syria. It would in theory apply to members of groups (if abroad) entirely unlinked to Islamic terrorism, such as citizens aiding international environmental groups advocating direct action. While it is almost inconceivable that TEOs would be used against members of such groups, the unnecessarily broad reach of the scheme - if it was deployed - renders it vulnerable to the argument that its reach fails proportionality demands under the ECHR⁵⁶ or the ICCPR.

Imposition of a TEO is initially in executive hands, and court permission is not needed at that point if the case is urgent, as it normally would be,⁵⁷ although court review is

⁵² [2007] EWCA Crim 243.

⁵³ In *R v Gul (Appellant)* [2013] UKSC 64, 23 October 2013. See Alan Greene, “The Quest for a Satisfactory definition of terrorism: *R v Gul*”, (2014) 77(5) Modern LR 780-793.

⁵⁴ *R v Gul* *ibid*, para 38. See also *David Miranda v Secretary of State for the Home Department* [2016] EWCA Civ 6 in which the Court of Appeal interpreted the definition more narrowly to exclude some journalistic activity, while finding that Schedule 7 TA had been deployed for a lawful purpose in the case of Miranda.

⁵⁵ These points are considered at length in David Anderson’s 2014 Report “the Terrorism Acts in 2013”, chapter 10.

⁵⁶ E.g. this point could arise in relation to government arguments seeking to justify imposition of a TEO under Article 8(2) ECHR in response to a challenge under s6 HRA by UK-based relatives of a TEO-subject detained abroad.

⁵⁷ S2(7). Condition E is that court permission for the TEO has been given, unless the Secretary of State reasonably considers that the case is urgent (see note 58).

subsequently required.⁵⁸ The review is governed by Civil Procedure Amendments (CPA)⁵⁹ to the Civil Procedure Rules (CPR), which have been made under Sched 3 CTSA.⁶⁰ The review can be conducted in private,⁶¹ in the absence of the applicant, who would normally still be abroad at that point,⁶² without notification to applicants, and without affording them the right to make representations at it, via their legal representatives.⁶³ The oversight provided at the initial court review while the TEO subject is still abroad is of a very minimal nature,⁶⁴ and of doubtful Article 6 ECHR-compliance for that reason, bearing in mind also its reliance on closed material. Under the CPA rules the court must ensure that a summary of that material does not contain material which it would be contrary to the public interest to disclose.⁶⁵ Due to the use of the term ‘public interest’ that is a broader provision than s8(1)(c) Justice and Security Act 2013 which provides, once closed material proceedings are declared (s6(1)), that “the court is required to give permission for material not to be disclosed if it considers that [its] disclosure...would be damaging to the interests of national security”. The model of imposition used is based partly on the wording that was used in the Prevention of Terrorism Act 2005 for imposing control orders and is now, with modification, used in the Terrorism Prevention and Investigation Measures Act 2011 (TPIMA). The standard of proof required to impose a TEO is that of reasonable suspicion, as for control orders. That is a lower standard than that of reasonable belief,⁶⁶ the standard initially used for imposition of TPIMs (creating a “lighter touch” replacement for control orders), which has now, however, been raised to the

⁵⁸ If an urgent TEO is imposed without court permission, Schedule 2 applies, providing that immediately after giving notice of its imposition, the Secretary of State must refer the imposition of the order to the court (para 3(1)).

⁵⁹ The Civil Procedure (Amendment) Rules 2015 No 406 (L.3), which came into force on 27.3.15.

⁶⁰ Sched 3 covers “TEO proceedings”: the permission of the court under s2(7); the reference to the court in relation to urgently imposed TEOs under Sched 2; the s11 review and appeals: Sched 3 para 1.

⁶¹ Sched 3 para 10; Rule 88.21 CPA.

⁶² Under Sched 3 para 2(2) (e) and in relation to urgently imposed TEOs, Sched 2 para 2(e): “the relevant court [may] conduct proceedings in the absence of any person, including a party to the proceedings” (or his legal representative); see also Rule 88.21 CPA.

⁶³ S3(3)(4) and Sched 2 para 3(4). Provision is made instead to appoint a Special Advocate (SA): under Sched 3 special advocates can be appointed to represent the applicant in s3 and s11 proceedings; but Sched 2 governing review of initial imposition of a TEO abroad does not mention appointment of an SA.

⁶⁴ *Supra* note 62. There need not be a ‘hearing’: Sched 3 CTSA, para 2(2)(b); Rule 88.20 CPA. In *BA (Nigeria) (FC) (Respondent) v Secretary of State for the Home Department* [2009] QB 686; the Court of Appeal described the pursuit of an appeal from outside the UK as having “a degree of unreality about it”.

⁶⁵ Sched 3 para 4(1)(e); Rule 88.28(6)(b) and Rule 88.28(8).

⁶⁶ *Secretary of State for the Home Department v CC, CF* [2012] EWHC 2837 reaffirmed that “reasonable belief” imposes a higher threshold than that which previously applied under the Prevention of Terrorism Act 2005 – reasonable suspicion, relying on *A and Others v Secretary of State for the Home Department* [2005] 1 WLR 414, para 229; *R v Saik* [2006] 2 WLR 993, para 120.

civil standard under the 2015 Act.⁶⁷ Reasonable suspicion represents the lowest standard of proof used so far for such non-trial-based measures. The over-broad and imprecise requirements for imposition of TEOs are therefore matched by the ease of their imposition.

The ‘management of return’ and exclusion aspects of TEOs

During the period when the TEO is in force various restrictions can be imposed; it comes into force when the individual, who must be abroad at the time, is given notice of its imposition,⁶⁸ although notice can also be *deemed* to have been given.⁶⁹ At that point the passport held by the excluded individual is automatically invalidated.⁷⁰ The TEO would then normally continue in force while the subject is abroad and need not expire after return to the UK,⁷¹ permitting obligations to be imposed after return. A significant restriction imposed on the TEO subject while abroad under s2(1) CTSA is that, on pain of criminal sanctions, he/she cannot enter the UK for a period of time once the TEO comes into force, until a permit to return is issued.⁷² If notice of the TEO has not been given to the individual, the fact that he/she could be deemed to have had notice does not preclude adducing lack of knowledge of the order as a defence of reasonable excuse.⁷³ But the TEO would still be valid, meaning that obligations could then be imposed on the suspect in the UK. The restriction on entering the UK is subject to certain safe-guarding provisions relating to deportation and to urgency of return. Under s2(1)(b) if the state the individual is in when the TEO is imposed decides to deport him, he will be allowed to enter the UK (which would mean that the management of return would no longer be under the UK’s control). Under s7(2) if the situation is urgent the Home Secretary may, but not must, issue a permit to return,⁷⁴ which may *inter alia* refer to the possibility that the suspect, having been detained abroad as a result of imposition of the

⁶⁷ S20(1) CTSA, amending s3(1) TPIMA.

⁶⁸ S4(3)(a).

⁶⁹ The suspect must be given notice of the imposition of the TEO (s13) except where S.I. 2015/438 Temporary Exclusion Orders (Notices) Regulations 2015 applies. This provision as to notice could cover the situation in which intelligence indicates that the suspect is in ISIS-held territory, or is in transit intending to seek to return to the UK, but at present the suspect’s whereabouts are not known.

⁷⁰ S4(9). Under s4(10) while it is in force, “the issue of a British passport to the excluded individual while he or she is outside the UK is not valid”.

⁷¹ S9(3)(b).

⁷² The sanction includes the threat of up to five years’ imprisonment if the individual returns in contravention of the restriction on return specified in the order, without reasonable excuse: s10(1).

⁷³ S10(4).

⁷⁴ If the Secretary of State considers it is expedient to issue a permit to return even though no application has been made under s6.

TEO, might be subjected to Article 3 ECHR treatment in detention.⁷⁵ The then Home Secretary also said in Parliament that if a state such as France or Turkey requested the UK to take back suspects without going through the deportation procedure, the UK would take them back, but again managing the return.⁷⁶

Unless one of those possibilities arises, the individual can be given a permit to return to Britain under s5 CTSA *if* he or she complies with the conditions it specifies,⁷⁷ allowing for management of the return. The permit must make specific provision about the time, manner and place of return to the UK,⁷⁸ meaning that the suspect's return is monitored and notified to border officials or police, and suspects could be added to watch lists, including authority-to-carry lists.⁷⁹ Under s5(3) the individual's failure to comply with a specified condition has the effect of invalidating the permit to return. If an individual fails to accept such a condition he or she could then remain excluded from the UK for a period of time, which could theoretically be up to two years under s4(3),⁸⁰ or more, on renewal of the TEO.⁸¹

The possibility that a person could be excluded from the UK for a period of years due to non-compliance with conditions imposed is, however, subject to the provision of s6(1) which covers the situation in which the TEO subject applies for a permit to return.⁸² If so, it *must* be issued, but *only* if the subject complies with a requirement that can be imposed by the Secretary of State - and is likely to be made a condition of return in most or all instances - to attend an interview with a police officer or immigration official at a time and a place specified by the Secretary of State.⁸³ If the applicant applies for a permit and co-operates by attending the interview he or she would not be excluded from the UK for more than "a reasonable period", although s6 does not specify how long might be viewed as "reasonable".

⁷⁵ See notes 167 and 181. See also text to note 186.

⁷⁶ Theresa May, 2nd reading House of Commons, 2 December 2014, Column 212.

⁷⁷ S5(2).

⁷⁸ S5(4).

⁷⁹ S22 CTSA enables the Secretary of State to operate an authority-to-carry scheme whereby a carrier must seek authority to carry persons on inbound or outbound journeys who come within the scope of the scheme. The scheme was introduced under CTSA (Authority to Carry Scheme) Regulations 2015 No. 997. The Authority to Carry Scheme (Civil Penalties) Regulations 2015 made under s24(7) CTSA, raises the penalty available to apply to carriers.

⁸⁰ Unless it is revoked or otherwise brought to an end earlier.

⁸¹ The TEO can be renewed after it has expired, if the relevant conditions in s2(1) apply: s4(8).

⁸² S5 could cover TEO subjects not yet traced abroad, since once a subject has been apprehended abroad he or she would be likely to apply for a permit to return, coming therefore within s6.

⁸³ S6(2).

So the subject would at the least be excluded from the UK for some weeks, or possibly longer, while the interview and permit to return were being put in place. But if the TEO subject does not apply for a permit or refuses to attend the interview that period could be two years or more.

In order to avoid infringing the privilege against self-incrimination under Article 6(1) ECHR, the Part 1 provisions, taken at face value, do not require the suspect to answer questions at the interview, merely to attend it. The privilege can relate to using compulsion to obtain information outside criminal proceedings that is later used in the charging of a person with a criminal offence.⁸⁴ If the information was later used in criminal proceedings against a TEO subject the privilege might be breached, if an element of compulsion was deemed to have been used in the specific sense in which that word is used in the Strasbourg Article 6 jurisprudence, which may not cover compulsion to *attend* an interview as opposed to compulsion to answer questions.⁸⁵ However, no provision for legal advice, for a legal advisor to attend the interview, or for audio-taping it, are made in CTSA, so safeguards against the use of compulsion are not apparent. TEO interviews present therefore a strong contrast to Schedule 7 TA ones (allowing for stops and questioning at ports, as discussed further below) since they are accompanied by a range of safeguards partly contained in an extensive Code of Practice.⁸⁶ Even if the information obtained was found to be inadmissible in criminal proceedings, it would not be in TPIM ones, allowing a TPIM to be imposed on return; also the information could lead to the apprehension of other suspects, or the uncovering of other information – so motivation to use compulsion would be present.

The varying aims of TEOs

Controlling the return of the suspect and evaluating the risk posed

Firstly, as discussed, TEOs are intended to enable management of the subject's return. The subject must engage with the authorities in order to obtain the permit and cannot enter the UK except by the permitted route, time and manner. But also they provide an opportunity, via the

⁸⁴ See *Weh v Austria* (2004) 40 E.H.R.R. 890.

⁸⁵ See e.g. *O'Halloran and Francis v UK* (2007) 46 E.H.R.R. 397, para 62.

⁸⁶ See note 95 and accompanying text.

interview, to evaluate the risk he or she may pose on return, enabling it to be managed in the UK,⁸⁷ as discussed in III B. The intention underlying ss4 and 5 CTSA, creating the threat of being debarred from the UK for a period, which could be substantial, appears to be to ensure that the applicant is incentivised to agree to the conditions and attend the interview in order to obtain the permit. The exclusion aspect of TEOs is therefore linked in that sense to the “managed return” aspect.

If, as the Annex to the December 2016 Report of the previous independent reviewer of terrorism considers to be the case, the “managed return” aspect of TEOs is their dominant aspect,⁸⁸ it might be asked why none have been deployed, since in that aspect they are much less likely to create the conflicts with the ECHR or ICCPR discussed below. The answer may be partly that there are practical problems in deploying TEOs,⁸⁹ and also that the existing range of measures, including use of Schedule 7 TA, and the charging of “precursor” special terrorism offences,⁹⁰ already offer alternative methods of dealing with the risk posed by returning FTFs. It might further be asked why the “exclusion” aspect of TEOs was included at all: if management of the return is the main aim of CTSA Part 1 then, rather than imposing temporary exclusion to impose the interview, an advance notification of return order could have been imposed instead.⁹¹ Such an order could have been combined with deployment of Schedule 7 TA, as amended, allowing for an interview at a UK border, during which, in contrast to a TEO interview, failing to answer questions is an offence and reasonable suspicion for the stop is not needed.⁹² Such a course might, however, have appeared less attractive to the government: the ECHR would obviously apply via s6 Human Rights Act, as would the safeguards in the TA itself, which include access to legal advice,⁹³ as improved to

⁸⁷ The Immigration Minister in evidence to the Joint Committee on Human Rights suggested that the government's main aim under TEOs was not to exclude UK nationals, but to delay the return to the UK of those who had gone abroad to fight, in order to manage that return, and deal with the risk to the public posed, although managing the return in Britain was not the only aim: Legislative Scrutiny: Counter-Terrorism and Security Bill, para 3.10, James Brokenshire MP, 3.12.14, Q25 (12.1.15, HL Paper 86, HC 859).

⁸⁸ See *supra* note 37.

⁸⁹ See *supra* note 9.

⁹⁰ See note 111.

⁹¹ As proposed by the Joint Committee on Human Rights (Legislative Scrutiny: Counter-Terrorism and Security Bill (2015)) Report of Session 2014-2015, HL Paper 86, HC 859, para 3.12.

⁹² Under Sched 7 paragraph 18.

⁹³ Schedule 8 TA provides certain rights, including the right to consult a solicitor and to have a named person informed of the detention.

an extent under the Anti-Social Behaviour, Crime and Policing Act 2014,⁹⁴ and the 2015 Schedule 7 Code of Practice.⁹⁵ But the fact that the executive would have to accept the application of the ECHR in respect of the use of Schedule 7 would only be of relevance if the government's assumption as to its lack of ECHR jurisdiction in respect of TEO subjects abroad is correct, something it has reason to doubt, as discussed below.

Management of the suspect after return

In order to take steps towards managing any risk the suspect poses, “permitted obligations” can also be imposed by the Secretary of State under s9(1) CTSA on TEO subjects after they have returned to the UK.⁹⁶ The ‘obligations’ refer to a range of conditions listed in s9 CTSA, arising under Schedule 1 TPIMA. The conditions in the permit under s9(2) could include being required to report to a police station, to notify the police of the place of residence and as to changes of address;⁹⁷ they could include a requirement to attend appointments, which can now include attending a de-radicalisation programme.⁹⁸ These are the less intrusive obligations capable of being imposed under TPIMA, but it is notable that they can be imposed on the reasonable suspicion standard under CTSA rather than the civil one now required under TPIMA.⁹⁹ The more intrusive ones, including the imposition of curfews or of forced relocation,¹⁰⁰ are not available under TEOs but, clearly, if the requisite evidence, possibly deriving from the interview, is present, (depending on proof to the civil standard that the person has been engaged in TRA) a TPIM order could instead be imposed under TPIMA, meaning that any of the TPIM obligations could be imposed.

Temporary exclusion from the UK

⁹⁴ Schedule 9 para 2(3) of the 2014 Act amends Schedule 7 to inter alia reduce the maximum period of time a suspect can be detained, to 6 hours; Schedule 9 para 3 amends Schedule 7 to disallow intimate searches.

⁹⁵ See “Examining Officers and Review Officers under Schedule 7 to the Terrorism Act 2000” Code of Practice, March 2015, up-dated 17.3.16. The Code covers inter alia requirements for reviews of detention, for taking non-intimate samples and treatment of children. CTSA 2015 also made further changes to the scope of the Schedule 7 power to examine goods (under s43 and Schedule 8).

⁹⁶ Outlined in s9(2). The notice imposing the obligations comes into force when given to the individual and continues in force until the TEO ends (s9(3)).

⁹⁷ S9(2) CTSA refers to Schedule 1 to the Terrorism Prevention and Investigation Measures Act 2011, para 10.

⁹⁸ Paragraph 10A, inserted by section 19 CTSA.

⁹⁹ See *supra* note 67.

¹⁰⁰ See note 104.

The third, less acknowledged, aim of TEOs appears to be to open the possibility of excluding suspects from the UK for lengthy periods, for up to two years, or more, bearing in mind that the TEO can be imposed without notification to the suspect,¹⁰¹ and that no ultimate time limit is specified in the Act as to the full period of time during which a person can be subjected to repeat TEOs. If the TEO subject has no notice of its imposition and therefore he fails to apply for a permit, or in any event he does not apply for one, the requirement to allow him to return within a “reasonable” time is not triggered. The addition of that potentially lengthy exclusion element appears to rest on the notion that it may have various advantages.

As TEO subjects would be outside the UK, the state takes the stance, as considered below, that it does not have jurisdictional competence for ECHR purposes. No provision is made in CTSA as to their detention abroad, leaving the TEO subjects to the responsibility of a host state which might not maintain the same standard of rights’ protection as the UK. A range of human rights violations could arise in the host state, including of Article 3 ECHR, as discussed further below.¹⁰² For a period of time the obligations of the UK to TEO subjects could be suspended – if the government’s stance on jurisdictional competence is correct. If the host state was prepared to take responsibility for the TEO subject, he would appear to fall under that state’s laws, and his practical ability to trigger or take advantage of the mechanisms in CTSA allowing return might be impaired. A situation somewhat similar to that created by the placement of persons in CIA “dark sites” might potentially arise if the TEO took effect in a state with a record of maltreatment of detainees.¹⁰³ That could have the benefit of leading to the acquisition of information by the host state’s security services which might be passed to UK security personnel. It might also lead to a situation in which the suspect became “lost” in the host state’s prison system, meaning that temporary absence from the UK became prolonged.

A period of exclusion could also disrupt the returnee’s ability to engage physically in terrorist activity in the UK while detained abroad, and any conspiracies he or she might have engaged in on return would be disrupted, as would association with other suspects. In that respect the scheme has aims somewhat similar to those underpinning use of forced relocation

¹⁰¹ See *supra* note 69.

¹⁰² See note 179 and associated text.

¹⁰³ See notes 163, 164 and 185.

within the UK under TPIMs.¹⁰⁴ But any such enhancement of security should be balanced against the potential impact of use of TEOs on global security generally. Further, the very existence of the exclusion aspect of TEOs, regardless of activation of the scheme, might also deter suspects from seeking to return *at all* from fighting or training with ISIS or similar groups.¹⁰⁵ It could therefore be suggested that TEOs are *intended* to function on a rhetorical, expressive level, in the sense that by creating various hurdles a returning FTF must surmount, the TEO regime could by its mere existence create a disincentive to return. But any such intention would not comport readily with the aim of managing the return or with the general responsibility of Britain to combat terrorism globally, since the suspect's engagement in terrorism would tend to be prolonged. The "managed return" and exclusion aspects of TEOs are therefore in some tension with each other.

The focus of TEOs on retaining a suspect in one physical space outside the territory of the UK for a period also creates an inherent limitation in their capacity to enhance security. The risk an FTF may pose does not relate *only* to presence in a physical space; it relates also to online efforts at radicalisation¹⁰⁶ and the fostering of terrorist conspiracies, globally. While reliance on TEOs does not precisely amount to exporting terrorism,¹⁰⁷ it does appear to presuppose that security could be enhanced by creating a scheme with the potential to ensure that the TEO subject remains outside the UK for a period. In that respect TEOs demonstrate continuity with earlier UK detention measures that made similar assumptions about terrorist activity and geographical location, including the "three walled prison" concept set up by Part 4 Anti-Terrorism, Crime and Security Act 2001, and by the UK government's efforts to deport non-citizen suspects using memoranda of understanding.¹⁰⁸

TEOs are also clearly inherently limited in terms of addressing the current security threat generally since, while it is partly created by FTF returnees from Syria or Iraq, those who have

¹⁰⁴ S16(1)-(5) CTSA amended paragraph 1, Schedule 1 TPIMA to allow relocation to be imposed.

¹⁰⁵ See David Anderson's 2016 Report (*supra* note 4), on this point: para 20(d).

¹⁰⁶ As David Anderson has pointed out "The volume and accessibility of extremist propaganda – some of it in the form of slickly-produced films – has increased. UK-based extremists are able to talk directly to ISIL fighters and their wives in web forums and on social media. The key risk is that this propaganda is able to inspire individuals to undertake attacks without ever travelling to Syria or Iraq" (*supra* note 17, 2015, para 2.11).

¹⁰⁷ See Lucia Zedner, *supra* note 42, 15.

¹⁰⁸ See: C Walker, "The Treatment of Foreign Terror Suspects" (2007) 70 MLR 427; J Blackbourn and C Walker, "Interdiction and Indoctrination: The Counter-Terrorism and Security Act 2015" (2016) 79 Modern Law Review 840, 852.

been thwarted in seeking to leave to fight with ISIS or similar groups¹⁰⁹ may in some instances pose a higher threat. Unlike those who have succeeded in leaving, they are less likely to be known to the security services. The threat from such persons, or from right-wing extremists,¹¹⁰ must therefore be left to the attention of “precursor” terrorism offences¹¹¹ or of TPIMs, since as mono-nationals they cannot be subject to the recent policy of determined use of deportation for non-national suspects.¹¹² TEOs are also largely irrelevant to addressing the risk to British citizens posed by Islamic terrorism abroad.¹¹³

Lack of a direct role in citizenship-stripping

TEOs are not intended to broaden the instances in which citizenship-stripping can occur, although that possibility has not been entirely ruled out for the future.¹¹⁴ The current position mentioned above in terms of permanent deprivation of citizenship is formally unchanged by the introduction of TEOs: persons whose actions are “seriously prejudicial to the vital interests of the UK” can be stripped of citizenship and have their passports withdrawn while inside or outside the UK, if they are dual nationals or naturalised citizens who have a reasonable prospect of attaining another nationality (British Nationality Act 1981 s40(4A)).¹¹⁵ The conduct of nationals who have fought with or supported ISIS or similar

¹⁰⁹ In some instances that might be either because they have been arrested before they can do so or because their travel documents have been seized under Home Secretary’s prerogative powers; or under s1 with Schedule 1 CTSA which enables police (and other authorised persons) to seize passports and other travel documents temporarily from British persons or foreign nationals), given reasonable grounds to suspect an intention of travelling for the purpose of involvement in terrorism-related activity abroad.

¹¹⁰ See *supra* note 2.

¹¹¹ In particular, the offence of engaging in any conduct in preparation for giving effect to the intention of committing terrorist acts or assisting another to commit such acts – s5 Terrorism Act 2006. The vast array of such offences includes offences of fund-raising: s15 TA 2000; using or possessing money or other property for purposes of terrorism: s16 TA; encouraging terrorism: s1 TA 2006.

¹¹² David Anderson has pointed out: “At the start of the control order regime in 2005, all controlled persons were foreign nationals. By the end in 2011, all were British citizens”: “Control Orders in 2011” Seventh Report, March 2012, 4.

¹¹³ See David Anderson (“The Terrorism Acts in 2014, Report of the Independent Reviewer”, September 2015), para 2.13, referring in particular to the June 2015 attacks in Tunisia (*supra* note 32).

¹¹⁴ The question of removal of citizenship to combat terrorism in circumstances going beyond those envisaged in the Immigration Act 2014 s66 s4A(c) (see note 115), and beyond the powers available under TEOs, may be a live one; the 2015 *Counter-extremism Strategy* (Cm 9148), para 104 stated: “We will review rules on citizenship...we will also consider...*how we can more easily revoke citizenship from those who reject our values*” (emphasis added). However, provision of that nature is not at present included in the Counter-extremism and Safeguarding Bill 2016-17; see further Counter-Extremism: Government Response to the Committee’s Second Report of Session 2016–17, First Special Report of Session 2016–17, HC 756.

¹¹⁵ The Immigration Act 2014 s66 inserted sub-section 4A: “the Secretary of State has reasonable grounds for believing that the person is able, under the law of a country or territory outside the UK, to become a national of such a country or territory” (s4A(c)). Under s66(2) “in reaching a decision to deprive on those grounds, the

groups would clearly fall within the “seriously prejudicial” provision, but they would retain citizenship unless one of the other conditions applied.

TEOs could have some indirect linkage with citizenship-stripping but *only* in the sense that imposition of a TEO on would-be returnees might provide an opportunity to determine while they were abroad whether s40(4A) of the British Nationality Act could apply.¹¹⁶ If one of the removal of citizenship categories *was* found to apply, citizenship could - as a matter of domestic law - then be removed while the TEO subject was still debarred from the UK.¹¹⁷

The place of TEOs within international human rights’ law

TEO subjects and statelessness

As discussed, TEOs are not to be equated with citizenship-deprivation orders. The UK provisions governing such deprivation are designed to create at least face-value compatibility with the Universal Declaration of Human Rights Article 15(1), providing that everyone has the right to a nationality.¹¹⁸ Compatibility with the 1961 Convention on the Reduction of Statelessness, which provides measures to prevent the creation of new cases of statelessness, has - it appears - been achieved since the UK had entered a reservation to Article 8,¹¹⁹ allowing for the deprivation of the nationality of a naturalised person, now

Home Secretary can take into account conduct which took place prior to the section coming into force”. It over-turned the principle from *Al-Jedda v SSHD* [2013] UKSC 62, [2013] WLR(D) 371 to the effect that an individual with only a hypothetical past or future claim to a nationality may not be stripped of citizenship (para 34). The non-operation of this provision was reviewed by David Anderson in a Report on deprivation of single-national citizenship, “Citizenship Removal Resulting in Statelessness” (April 2016).

¹¹⁶ The Bureau of Investigative Journalism reported a significant increase in the use of deprivation powers, in part due to British citizens travelling to fight in Syria; Alice Ross and Patrick Galey found that in most cases, the deprivation orders had been issued whilst the individual was overseas: “Rise in citizenship-stripping as government cracks down on UK fighters in Syria”, 23.12.13 (<https://www.thebureauinvestigates.com/stories/2014-02-13/home-secretary-waited-until-terror-suspect-was-abroad-before-stripping-citizenship> [last accessed 20.4.17]).

¹¹⁷ In *practice* that could render the individual stateless. If so, the 1954 Convention (see note 119) would apply. It establishes minimum standards of treatment for stateless people in respect of a number of rights, including, but not limited to, the rights to education, employment and housing. It also guarantees stateless people a right to identity, travel documents and administrative assistance.

¹¹⁸ While Article 15(2) provides that “No one shall be arbitrarily deprived of his nationality”; see Mirna Adjami and Julia Harrington, “The scope and content of Article 15 UDHR”, (2008) 27(3) Refugee Survey Quarterly 93-109.

¹¹⁹ Article 8(1) provides: “A Contracting State shall not deprive a person of his nationality if such deprivation would render him stateless”. The reservation relates to Article 8(3). Article 7 is intended to prevent citizens renouncing citizenship except in certain circumstances. The 1954 Convention relating to the Status of Stateless

covering the deprivations mentioned above, where the national has a reasonable prospect of acquiring another nationality.¹²⁰

These general international human rights law measures have been taken by the government to mean that *permanent* exclusion of mono-national terror suspects from the UK should not be undertaken at present. For that reason, as mentioned above, France also recently ruled out exclusion of French FTF returnees.¹²¹ TEOs could, however, potentially place persons in limbo as far as their nationality is concerned, with no territory to return to for a period of time, except the community of fighters termed ISIS (or a similar group) which is not recognised as a state. The question then is whether a measure making a person in effect stateless, even on a temporary basis, might be contrary to the international law measures mentioned.¹²² It might be said that for a short period of time abroad, once his or her passport had been invalidated, and it would be a criminal offence to seek to enter the UK without a permit to return, the TEO subject is “stateless” in common parlance.

But temporary exclusion from the UK of persons suspected of involvement with ISIS, or related groups, after reaching, for example, a Turkish airport, to allow identification and imposition of a TEO, *but* with the intention of re-admitting them to the UK when they apply to do so, and after they had agreed to an interview, would not appear to infringe international law on statelessness. If TEOs are deployed, but detentions abroad are brief – as would be probable in practice in most instances since once suspects attend an interview they must be allowed to return within a reasonable time – then the impact of TEOs may be said to bear little resemblance to a complete revocation of citizenship rendering a person stateless within the meaning of the 1961 Convention. Detention and invalidation of the passport create a travel restriction, but are not equivalent to a *de jure* removal of nationality, and the intention to admit TEO subjects to the UK, without removal of citizenship, would indicate that no *de*

Persons Article 1 defines a stateless person as “a person who is not considered as a national by any State under the operation of its law”. See Mathew Gibney, “Statelessness and Citizenship”, esp. at 61,62 in A Edwards & L Van Waas (eds) *Nationality and Statelessness under International Law*, (Cambridge: Cambridge University Press, 2014).

¹²⁰ See Immigration Act 2014 Explanatory Notes: commentary on s66.

¹²¹ *Supra* note 43.

¹²² Dominic Grieve has pointed out that TEOs could be found to render a person stateless (Hansard, 2.12.14: Col 228), but his comment was made before the Act emerged in its final form.

facto imposition of statelessness was occurring, since TEO subjects would remain UK mono-nationals and would therefore be able to establish their nationality.¹²³

Decisions as to citizenship are capable of engaging Article 8 ECHR because nationality is part of a person's identity and therefore relates to their private life,¹²⁴ but given the likelihood that TEOs (if deployed) would impose in most instances brief periods of exclusion from the UK, their use would not be viewed as affecting national identity. The same conclusion may also be reached as to Article 8(1) of the Convention on the Rights of the Child (bearing in mind that some of those who have left Britain to join ISIS or similar groups are children),¹²⁵ which provides that state parties undertake to "respect the right of the child to preserve his or her identity, including nationality...as recognized by law without unlawful interference".

Arbitrary deprivation of the right to enter one's own country

Use of TEOs to exclude persons for more than brief periods appears, however, potentially to be in some tension with the UK's obligation under the ICCPR Article 12(4)¹²⁶ to avoid arbitrary deprivation of the right to enter a person's own country.¹²⁷ Article 12(4) echoes a fundamental principle of the common law,¹²⁸ also recognised in the provision against exile in Magna Carta, that an individual should be free to reside in his own land.¹²⁹ The UN Human Rights Committee ruled in 1999 that "there are few, if any, circumstances in which

¹²³ See further W. E. Conklin *Statelessness: the Enigma of an International Community* (Hart, London, 2014) 5 and Chap 4.

¹²⁴ See *Genovese v Malta* (App. No. 53124/09), judgment of 11 November 2011, para 30; *Karashev v Finland* (dec.), (App. No. 31414/96), judgment of 12 January 1999, ECHR 1999-II.

¹²⁵ E.g. the teenagers Shamima Begum, Kadiza Sultana and Amira Abase, left Britain for Syria in February 2015: see W Watkinson "Two Bethnal Green Schoolgirls now married to ISIS men in Syria", *the International Business Times* 4.7.15. See also R van Spaendonck, "To School or to Syria? The foreign fighter phenomenon from a children's rights perspective" (2016) 12 Utrecht Law Review 41, 62.

¹²⁶ That right to return under Article 12(4) is not subject to the same restrictions as are paragraphs 1 and 2 of the same Article, which permit restrictions to protect inter alia national security, or the rights and freedoms of others.

¹²⁷ Nationality is judged by reference to a "genuine and effective link" to the state in question: the International Court of Justice's ruling in *Nottebohm*, judgment of 6 April 1955. The British courts apply a narrower approach under the "Bradshaw principle" established by the Court of Appeal: *Bradshaw* (1994) Imm AR 559.

¹²⁸ In *Pham v Secretary of State for the Home Dept* [2015] UKSC 19 Lord Mance stressed that the status of citizenship is "as fundamental at common law as it is in European and international law" (para 97) and referred to the right to reside in or return to the UK as "a constitutional right" of the citizen.

¹²⁹ Clause 39 of Magna Carta states: "No free man shall be ... outlawed or exiled". See also Dominic Grieve's comments on this issue: 2nd reading HC 2 December 2014, Column 228.

deprivation of the right to enter one's own country could be reasonable.”¹³⁰ Obviously, unlike citizenship deprivation, imposition of a TEO does not annul a widely accepted incident of citizenship, namely the ability to return to one’s home country. But in creating the potential to prevent that return for a considerable period of time, a TEO could create an interference with that ability akin to the impact of citizenship deprivation. Amnesty International found in 2017 that such orders “temporarily exclude from their home those who have a right to live in the UK, in contravention of the right to freedom of movement and the right to return to one’s own country”.¹³¹ Nevertheless, it is not yet established in international law that a *temporary* deprivation of the ability to enter one’s own country would create a violation of Article 12(4), bearing in mind that, as discussed, TEOs presuppose that the TEO subject can return within a “reasonable” period.

Jurisdictional competence under the ECHR, ICCPR, Human Rights Act

As is well established in international human rights law in general, the scope of human rights’ obligations is essentially determined by territoriality, but there are certain exceptions whereby states may be found to have such obligations beyond their borders to persons not on the state’s territory, but within the power or effective control of the state. State parties’ obligations under the ICCPR are limited under Article 2 to “all individuals within its territory and subject to its jurisdiction”.¹³² The UN Human Rights Committee (HRC) has interpreted Article 2 to mean that “a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party”.¹³³

¹³⁰ See Human Rights Committee, General Comment 27, Freedom of movement (Art.12), U.N. Doc CCPR/C/21/Rev.1/Add.9 (1999) adopted at the 1783rd meeting (sixty-seventh session), 18.10.99, para 21.

¹³¹ “Europe: Dangerously disproportionate: The ever-expanding national security state in Europe”, Amnesty International Report, 17 January 2017, Index number: EUR 01/5342/2017, at 53.

¹³² For comment see Hugh King, “The Extraterritorial Human Rights Obligations of States” (2009) *Human Rights Law Rev* 521, 522–30.

¹³³ HRC General Comment No. 31 “Nature of the General Legal Obligation imposed on State Parties to the Covenant” 26.5.04 UN Doc CCPR/C/21/Rev.1/Add.13 (2005), [10]; the ICJ “Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory” Advisory Opinion 9 July 2004, ICJ Report 136, paras 109 and 111. See H Duffy, *The ‘War on Terror’ and the Framework of International Law* (Cambridge: Cambridge University Press, 2nd edn, 2015), 469–472.

Similarly, Article 1 ECHR sets limits on the reach of the Convention since it only applies to everyone within the “jurisdiction” of a contracting party.¹³⁴ The term “jurisdiction” was originally seen by some contracting states as referring to the presence of persons on the legal territory of the contracting state in question.¹³⁵ But the concept of territoriality, echoing the position adopted by the HRC, has partially been replaced by a concept of jurisdiction not necessarily linked to such presence, although the legal space so delineated is not fully clear.¹³⁶ The territorial reach of the ECHR under the Human Rights Act, as opposed to that of the ECHR as determined at Strasbourg, appears to mirror the Strasbourg concept of jurisdiction, but not to go further than it does.¹³⁷

A state can be found to have ECHR jurisdiction, first when it exercises effective control over an area outside its national territory,¹³⁸ and second where its agents exercise a degree of authority over persons on the territory of another state, but not effective control over territory. As to the first exception to territoriality, states’ obligations to secure the rights in such an area derives from the fact that they are exercising effective control there, whether that is done directly, through the state’s armed forces,¹³⁹ or through a subordinate local administration. Thus, detention of enemy combatants in Afghanistan and Iraq was found in 2015 by the Court of Appeal to breach Article 5 ECHR¹⁴⁰ on the basis that, due to the presence of British soldiers, the UK was found to have effective control over the areas in question.

¹³⁴ Article 1 ECHR: “[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention”.

¹³⁵ The term was taken to refer originally to the concept of *ratione loci*, and operated as a separate ground of admissibility of complaints. In *Cyprus v Turkey* (First and Second Applications) (App. Nos. 6780/74 and 6950/75), 2 DR 125 (1975), Turkey’s argument that the Commission did not have jurisdiction *ratione loci* to examine the complaint since it related to actions of Turkish armed forces operating outside Turkey was rejected.

¹³⁶ See Tarik Abdel-Monem, “How Far Do the Lawless Areas of Europe Extend? Extraterritorial Application of the European Convention on Human Rights”, (2005) 14 J Transnatl. L. & Policy 159, 196–197; E Roxstrom, Mathew Gibney, and T Einarsen, “The NATO Bombing Case (*Banković et al v Belgium et al*) and the Limits of Western Human Rights Protection”, (2005) 23 Boston UILJ 55, 89–91.

¹³⁷ *Regina v. Secretary of State for Foreign and Commonwealth Affairs (Appellant) ex parte Quark Fishing Limited (Respondents) Regina v. Secretary of State for Foreign and Commonwealth Affairs (Respondent) ex parte Quark Fishing Limited (Appellants) (Conjoined Appeals)* [2005] UKHL 57 applied the ‘mirror principle’ under s2 HRA to territoriality. Lord Bingham (para 25) emphasised that the HRA’s purpose was not to expand Strasbourg remedies: “The territorial focus of the Act is clearly shown by the definition of ‘the Convention’ in s21 to mean the ECHR as it has effect for the time being in relation to the United Kingdom”. See also note 170 below.

¹³⁸ *Loizidou v Turkey (Preliminary Objections)* 20 E.H.R.R. 99, A 310 (1995), para 62.

¹³⁹ *Al-Skeini v UK* (GC) (App. No. 55721/07), judgment of 7 July 2011.

¹⁴⁰ *Serdar Mohammed v Ministry of Defence; Mohammed Qasim, Mohammed Nazim and Abdullah v Secretary of State for Defence* [2015] EWCA Civ 843. The applicant, Serdar Mohammed, won the case against the

That first exception is very unlikely to apply in respect of TEOs used in current combat zones since returnees may be detained abroad in a third party host state such as Turkey, or in parts of Syria or Iraq, where UK ground troops do not exercise control over areas of territory. The second exception, however, covers a range of exercises of authority and control over persons by one state's agents on the territory of another¹⁴¹ - personal rather than territorial control, although extraterritorial jurisdiction still remains exceptional.¹⁴² That second exception, based on the "personal model of jurisdiction",¹⁴³ can arise if a state exercises executive public powers on the territory of another state by agreement with the state in question.¹⁴⁴ In *Banković v Belgium and others*¹⁴⁵ NATO forces had bombed a Radio station in Belgrade, killing members of the families of the applicants. The Grand Chamber found that there was no jurisdictional link between the persons who were victims of the act complained of and the respondent States on the basis that jurisdiction was largely determined by territoriality, and the special exceptions in respect of military occupation, or the exercise of public powers on the territory of another state by agreement with that state, did not apply.

But in *Ocalan v Turkey*¹⁴⁶ jurisdictional competence was found on the basis that Kenyan officials had handed over the applicant to Turkish officials operating in Nairobi airport who had arrested him and forced him to return to Turkey. The Court distinguished *Banković* on the basis that the applicant was subject to a continuing exercise of the authority and control of the Turkish officials after his arrest. Turkey clearly lacked effective control over any part of Kenyan territory, but "directly after being handed over to the Turkish officials by the Kenyan

government for wrongful detention after being captured by British troops in 2010. The Judges upheld the claim that under Article 5 ECHR he could not be held for longer than 96 hours; he was detained for four months.

¹⁴¹ See the instances considered in *Chagos Islanders v UK* (App. No. 35622/04), judgment of 11 December 2012, para 70.

¹⁴² In *Chagos Islanders* (ibid), para 71, it was found that such jurisdiction is still exceptional after *Al-Skeini* (note 139).

¹⁴³ See: Marko Milanovic, *Extraterritorial application of Human Rights Treaties: Law, Principles and Policy* (Oxford: Oxford University Press, 2011), 173; Marko Milanovic, (2012) (note 149) 121-139, at 122; Christine Byron, "A Blurring of the Boundaries: The Application of International Humanitarian Law by Human Rights Bodies", (2007) 47 *VaJIntL* 839, 891-895; Conall Mallory, "Abolitionists at Home and Abroad: A Right to Consular Assistance and the Death Penalty", (2016) 17(1) *Melbourne Journal of International Law* 51.

¹⁴⁴ *Banković and Others v Belgium and Others* (dec.) (GC), (App. No. 52207/99), judgment of 12 December 2001, ECHR 2001-XII, para 71.

¹⁴⁵ *Banković and Others* (ibid). Further, those exceptions, it was found, would not apply in Iraq: they would only be found to apply within the *espace juridique* or the "legal space of the contracting parties of the ECHR" (para 80).

¹⁴⁶ *Ocalan v Turkey* (GC) (App. No. 46221/99), judgment of 12 May 2005. See also *Andreou v Turkey* (App. No. 4653/99), judgment of 27 October 2009; *Ilascu and others v Molodova and the Russian Federation* (App. No. 48797/99), judgment of 8 July 2004.

officials, the applicant was under effective Turkish authority and therefore within the ‘jurisdiction’ of that State”, even though Turkey had exercised its authority outside its territory.¹⁴⁷ *Ocalan* therefore focused more closely than *Banković* on the exercise of such control on another state’s territory. Similarly, in *Medvedyev and Others v France*¹⁴⁸ the Court held that the applicants were within French jurisdiction by virtue of the exercise by French agents of full and exclusive control over a ship and its crew from the time of its interception in international waters.

The scope of this exception was confirmed in the Grand Chamber decision in *Al-Skeini v UK* which relied on this more expansive conception of Article 1.¹⁴⁹ The claims in *Al-Skeini* were brought in respect of civilians killed in Iraq. The Grand Chamber found: “Following the removal from power of the Ba’ath regime and until the accession of the Interim Government, the UK...assumed in Iraq the exercise of some of the public powers normally to be exercised by a sovereign government. In particular, the UK assumed authority and responsibility for the maintenance of security in South East Iraq”. The judgment concluded that “whenever the State through its agents exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under...the Convention that are relevant to the situation of that individual”.¹⁵⁰ That was a bold, unequivocal statement of principle, apparently fixing a state with jurisdiction whenever it exercises authority and control over an individual outside its territory, even without the agreement of the other state, and even outside the legal space of the contracting states (*espace juridique*).¹⁵¹ The “authority and control” test from *Al-Skeini* for jurisdiction has recently received the imprimatur of the Supreme Court in the UK on two occasions.¹⁵² The decisive factor in these post- *Banković* decisions was found to be the exercise of physical power and control by agents of one state over the persons in question on the territory of another.

¹⁴⁷ Ibid, para 91.

¹⁴⁸ (GC), (App. No. 3394/03), judgment of 29 May 2010, para 67.

¹⁴⁹ *Al-Skeini and others v UK* (App. No. 55721/07), judgment of 7 July 2011. For discussion see Marko Milanovic, “*Al-Skeini and Al-Jedda in Strasbourg*”, (2012) 23(1) EJ IntL 121-139.

¹⁵⁰ Ibid, para 149; paras 136–137.

¹⁵¹ See *supra* note 145.

¹⁵² *Smith v The Ministry of Defence* (JUSTICE intervening) [2013] UKSC 41, [2014] AC 52; *R (on the application of Sandiford) (Appellant) v The Secretary of State for Foreign and Commonwealth Affairs (Respondent)* [2014] UKSC 44, paras 20, 22.

TEOs and jurisdictional competence

The government differentiates between citizenship-stripping and TEO imposition in that while it considers that the ECHR does not apply extra-territorially in the former instance, it finds that to be the case *a fortiori* in relation to TEO-imposition: “Compared with deprivation, temporary exclusion involves a manifestly less significant interference with an individual’s ability to request the UK’s assistance overseas or to travel to the UK”.¹⁵³ Goodwin-Gill, however, has argued in relation to citizen-stripping, not TEO imposition, while a citizen is abroad that in so doing the UK is inevitably engaging in an exercise of jurisdiction over the subject and that therefore, contrary to the view of the government, such a person could rely on the ECHR against the UK.¹⁵⁴ A somewhat similar argument, partly founded on *Al-Skeini*, could also be applied to the imposition of a TEO abroad on the basis that the act of imposition may be capable of amounting to an exercise of jurisdiction for ECHR and ICCPR purposes, since it represents an exercise of authority and control over an individual - albeit of a less profound nature than is represented by citizenship-deprivation - and that thereafter jurisdiction cannot be avoided.

While citizenship-stripping could be covered by the *Al-Skeini* exercise of “authority and control” principle, since it must be implemented by UK officials, not the officials of the host state, that principle might not apply so clearly to TEO-imposition. One possibility is that a British official in, for example, Turkey, would directly serve notice of the TEO on the recipient, and Turkey would subsequently detain him or her. In that instance the serving of the notice, and its causal connection with an exercise of authority and control over the recipient, would, it is argued, mean that the UK had not divested itself of its jurisdictional responsibility to the subject, even though, in contrast to the situations in *Al-Skeini* or *Ocalan*, the exercise of such control by UK officials was brief.

¹⁵³ See para 12 ECHR memo (note 159, below). The memo also points out that in *SI, UI and VI v SSHD* (SIAC judgment of 21 December 2012) SIAC found that depriving dual nationals of citizenship while they were in Pakistan did not engage the ECHR. See also note 160.

¹⁵⁴ “...the act of deprivation [of citizenship] only has meaning if it is directed at someone who is *within* the jurisdiction of the State. A citizen is manifestly someone subject to and within the jurisdiction of the State, and the purported act of deprivation is intended precisely to affect his or her rights” (Human Rights Joint Committee, ‘Legislative Scrutiny: Immigration Bill’ (Second Report), S. 50, <http://www.publications.parliament.uk/pa/jt201314/jtselect/jtrights/142/14205.htm>, Goodwin-Gill, p16).

But if in contrast UK agents gave notice to Turkish officials that the suspect was about to enter Turkey at a certain location, and that the TEO had come into force, although notice had not been given to its subject,¹⁵⁵ whereupon Turkish agents intercepted and arrested him, their actions would amount to a direct exercise of authority and control; therefore jurisdictional competence could vest in Turkey rather than in the UK. That argument might be accepted at Strasbourg, given the focus of the Court, as discussed, on exertion of full physical authority and control over persons by agents of one state operating outside its borders. Its basis is that such exertion by the agents of one state (in this case, the *host* state) can or should overwhelm the original basis for such exertion, imposed by another state (in this instance due to the Home Secretary's decision to impose the TEO), such that jurisdictional competence passed from the UK to the host state. Thus, in *Ocalan*, if Turkish officials had conveyed to Kenyan ones Turkey's decision that the applicant as a terrorist suspect should be arrested, meaning that the Kenyan officials effected the arrest and detention before eventually handing the applicant back to Turkey, Turkish jurisdiction probably would not have been found, but the original decision of the Turkish authorities could nevertheless have led to purported interferences with ECHR rights.

It is argued, however, that too close a focus on direct physical control of an individual risks disregarding the fact that the UK is able to impose a TEO precisely because it has the power to do so in the first place. Nevertheless, on this proposed model of jurisdiction, it is argued that coercive physical control over an individual would *also* have to exist, which would need to flow *directly* from the actions or decisions of UK officials, even if they were not themselves exercising such control on the territory of another state. Otherwise, *any* decision of UK officials in respect of UK nationals abroad, affecting ECHR rights, which such officials had the power to make, could fix the UK with ECHR jurisdictional competence. The Supreme Court has made it clear that not every decision of a UK official in respect of UK nationals abroad affecting their rights under the ECHR will attract UK jurisdictional competence; it found in *Sandiford*¹⁵⁶ that it only does so if those officials, not the officials of the host state, are exercising authority and control, as in *Al-Skeini*. In *Sandiford* the Supreme Court found that provision of some Consular assistance to UK nationals abroad did not mean that jurisdictional competence arose. Such assistance had been rendered to a woman facing the death penalty in Indonesia, but the argument that therefore

¹⁵⁵ The TEO subject can be deemed to have received such notice: see *supra* note 69.

¹⁵⁶ *R (on the application of Sandiford) (Appellant)* (note 152).

such competence arose, and so the UK had to abide by Article 6 ECHR by providing funds to pay for her legal assistance, was rejected.¹⁵⁷

But it was also implicit in *Sandiford* that if the actions of the host state authorities *had* resulted directly from an exercise of authority over the claimant by UK agents – which in that instance they had not – UK jurisdictional competence could have been found. Thus it is not the case that if a very close nexus between the acts or decisions of officials of a contracting state and potential ECHR violations, as well as violations of *jus cogens* norms, is found, the state may be found to have jurisdictional competence in respect of such acts outside its territory, if it cannot be said to have directly exercised authority and control over those individuals.¹⁵⁸ But it is argued that such competence *could* be found if the direct exercise of authority and control by agents of another state is clearly causally linked to a decision taken by the UK executive. TEO imposition occurs due to a decision by the Home Secretary – the exercise of authority and control - and then either leads to the coercive control over the TEO subject by host state agents or by UK agents operating in the host state. At some point, even in the former instance, the TEO subject returns to the control of UK officials, when the interview and the permit to return are being put in place, in both instances representing exercises of control. It is argued that no true distinction arises between the two cases, disallowing UK jurisdictional competence to be imposed in the former instance due to the fact that for a period authority and control are exercised by host state agents. It should also be pointed out that the policy grounds for denying jurisdiction in cases of some actions by European states on foreign territory, or in respect of decisions as to nationals abroad, as in *Sandiford* involving the UK, are not present in the special case of reliance on TEOs against a state's own citizens abroad.

The UK government, as indicated, takes the stance, however, that any potential violations of the ECHR abroad resulting from the imposition of the TEO would be the responsibility of the state in question, not of the UK, and would fall under that state's laws. The 2015 Act was passed with the assurance from the Home Secretary – via the s19 HRA statement of

¹⁵⁷ See in particular para 33: “Article 6 would become a compulsory world-wide legal aid scheme for impecunious British citizens abroad, presumably even for those who had decided to live permanently abroad.”

¹⁵⁸ See further Sarah Miller, “Revisiting Extraterritorial Jurisdiction: A Territorial Justification for Extraterritorial Jurisdiction under the European Convention” (2009) 20(4) EJIntL 1223-1246.

compatibility and the ECHR memo accompanying CTSA¹⁵⁹ – that the TEO provisions are ECHR-compatible. The statement of compatibility rested on the claimed jurisdictional barrier to reliance on the ECHR rights via the HRA by TEO subjects abroad, on the basis that since the subjects would be outside the territory of the UK for a period of time, they would also be outside its jurisdiction and therefore unable to rely on the ECHR under the HRA against the UK.¹⁶⁰ The assumption also appeared to be – although obviously that was not stated in the ECHR memo – that the ICCPR also would not apply, and nor would principles of the common law, on the basis that they would follow the same contours as to jurisdictional competence as under the ECHR.¹⁶¹

In the ECHR memo the Home Office contemplated the second exception considered above in relation to TEOs, but failed to consider the relevant jurisprudence in full: it relied on *Khan v UK*¹⁶² which concerned a dual national suspected of terrorism-related activity who had been placed in immigration detention but had then left the UK voluntarily for Pakistan. He was informed when abroad that his leave to remain had been cancelled. In his application to the Strasbourg Court the applicant complained, *inter alia*, of violations of Articles 2, 3, 5 and 6 ECHR. In finding his application inadmissible, the Court found that the exceptions to territoriality, giving the UK jurisdictional competence, did not apply since Khan had departed voluntarily and was not under the control of British officials in Pakistan.

Khan's situation was not, however, fully analogous to that of TEO subjects abroad; while they have also left the UK voluntarily, the TEO imposition by the Home Secretary is very likely to lead to detention in the host state. In contrast to the position in *Khan*, TEO subjects are not therefore likely to be able to move around freely in that state. But in Khan's case the causal connection between cancelling the leave to remain and his claim that he might be detained in Pakistan appeared to be missing, given that cancelling the leave would not necessarily lead to detention, whereas TEO imposition generally would. The government's assumption as to jurisdiction was straightforwardly based on the proposition that the ECHR

¹⁵⁹ The ECHR memorandum (BILLS (14-15) 059).

¹⁶⁰ The ECHR memorandum (*ibid*) stated (para 10): "The Home Office notes that TEOs may only be imposed on subjects outside the UK. As such, the ECHR is not directly engaged". See also Counter-Terrorism and Security Bill – Temporary Exclusion Orders', Impact Assessment: IA No: HO0144, 21.11.14. This contention was made originally in respect of the Immigration Bill (as it then was) 2014: see ECHR Supplementary Memorandum, 29.1.14. But see note 154.

¹⁶¹ See *supra* note 137.

¹⁶² (App. No. 11987/11), judgment of 28 January 2014.

will not be engaged extra-territorially if a person has left the UK voluntarily, and is not subject to British control when abroad; it did not – as far as the wording of the ECHR memo is concerned - take account of the causal relationship between an initial UK exercise of authority and control and such subsequent exercise by the host state.

The intention of the government to escape ECHR responsibility since another state's officials would take responsibility for TEO subjects is somewhat reminiscent of the Bush government's argument (recently alluded to with approval by President Trump)¹⁶³ justifying detention and use of forms of torture in Guantanamo and other "dark sites", on the basis that international human rights' law and the US Constitution did not apply to offshore sites.¹⁶⁴ TEOs could therefore be viewed merely as devices designed to seek to deflect attention on territorial grounds for the UK's responsibility for the treatment to which the suspect under a TEO could be subjected abroad. CTSA Part 1 Chapter 2 itself appears to be designed to avoid the implication of jurisdictional competence since it contains no arrest power or provision as to detention. The stance taken by the state as to jurisdiction in respect of TEOs implies that the executive is seeking to impose – in effect – a less expansive version of Article 1 ECHR under the HRA, than could be recognised at Strasbourg.

In practice, if TEOs were deployed, and a TEO took effect in a non-contracting state without direct exertion of authority and control by UK agents operating abroad, the UK authorities would, taking account of the position as expressed in the ECHR memo, proceed on the basis that they did not have jurisdiction for ECHR purposes. The assumption would be that reliance on the ECHR against the UK would be precluded while the subject was abroad. He or she would in effect be in a *de facto* legal "black hole" for a period of time, given that UK agents and those of the host state would act in accordance with the assumption that the UK had relinquished its responsibility to the subject under human rights law. For example, Kenya is a possible host state in respect of TEO subjects who may have left the UK to support or fight with Al-Shabaab, so even though international human rights law, including

¹⁶³ See: J Davis, D Sanger, M Haberman: Trump's draft orders "include reviewing whether to resume the once-secret 'black site' detention program; keep open the prison at Guantánamo Bay... start a review of whether to reinstate the program of interrogation of high-value alien terrorists to be operated outside the United States, and whether such a program should include the use of detention facilities operated by the C.I.A" *the New York Times* 24.1.17.

¹⁶⁴ See: Clair Apodaca *Understanding US Human Rights Policy: A Paradoxical Legacy* (2006) (Taylor and Francis, New York) 188; Jordan J. Paust *Beyond the Law: The Bush Administration's Unlawful Responses in the "War" on Terror* (New York: Cambridge University Press, 2007).

the ICCPR, would apply to Kenyan officials,¹⁶⁵ the human rights standards being maintained, especially in respect of a person who might be deemed an enemy combatant, would not be high. The government has stated that it would not seek to impose a TEO or engage in agreements related to TEOs in states where the TEO subject might therefore be placed at risk,¹⁶⁶ but it is argued that executive assurances of that nature are insufficient. If instead a TEO took effect in a contracting state its police or security services might proceed on the assumption that ECHR rights could be relied upon against itself. But its record of human rights violations and of compliance with Strasbourg decisions might well be inferior to that of the UK in respect of treatment in detention.¹⁶⁷ Parliament has been told that the UK is seeking to reach agreements with Turkey and other possible host states on this matter, whereby they would detain TEO subjects,¹⁶⁸ but no mention has yet been made of the results or of reciprocal arrangements between the two states.¹⁶⁹ Thus the fact that the host state might proceed on the basis that it had jurisdictional competence in respect of the subject would not preclude the possibility that violations of the ECHR might arise.

If TEOs are deployed, it is, however, fairly likely to be found eventually in the domestic courts that the UK had jurisdictional competence in relation to the TEO-subject while outside the UK, following *Al-Skeini* and the argument above. If therefore the notification of the TEO and a subsequent detention was undertaken by officials of another state by agreement with the Home Secretary, the UK would not be able to divest itself of responsibility for the

¹⁶⁵ Depending on the state and situation, since a situation of armed conflict was considered to exist, resort to armed force between governmental authorities and organised armed groups, international humanitarian law as opposed to international human rights law could be deemed to apply: *Prosecutor v Tadic*, Case No IT-94-1-AR72, ICTY Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber) 2 October 1995, para 70.

¹⁶⁶ "...the Government...is mindful of the possibility that [persons] might be exposed to risks in particular countries as a result of being subject to a TEO....in some instances, in order to avoid these risks materialising, the Government would choose not to liaise with certain countries to enforce a TEO" (Secondary Legislation Scrutiny Committee, 33rd Report 24 March 2015, section 6.01 Correspondence on Temporary Exclusion Orders (Notices) Regulations 2015 (SI 2015/438)).

¹⁶⁷ In particular, Turkey's record on subjecting persons to Article 3 treatment has been criticised a number of times by the UN Committee Against Torture: see its Report, Forty-fifth session, 1–19 November 2010, para 7.

¹⁶⁸ See also 2nd reading House of Commons 2 December 2014, Column 226, Mr Jim Cunningham: "One thing that has bedevilled these debates is that neither the Home Secretary nor anyone else has made it clear which countries are prepared to co-operate, particularly with Turkey which sends different signals".

¹⁶⁹ The Minister for Immigration did not answer the question about what the UK would do if a foreign national was in the UK when another state cancelled his passport so that he could not return to that state: para 3.5 (Legislative Scrutiny: Counter-Terrorism and Security Bill, James Brokenshire MP, 12 January 2015, HL Paper 86, HC 859).

treatment of TEO subjects under the HRA.¹⁷⁰ That would obviously *a fortiori* also be the case if a TEO was imposed on the authority of the UK government with involvement of UK officials operating abroad, not only in the TEO's imposition, but also (possibly in combination with officials of the host state) in a subsequent detention, prior to and leading up to organising the interview abroad and setting out the conditions in the permit.

But the UK would not necessarily be deemed to have jurisdictional competence in respect of *all* potential violations of the ECHR abroad relating to TEO subjects, following *Al-Skeini*.¹⁷¹ If it *was* found to have such competence in respect of the ECHR rights scheduled in the HRA, a scope would be accorded to Article 1 ECHR dissonant with that accorded to it at Strasbourg, since the Court in *Al-Skeini v UK* clearly contemplated situations in which a state could act in a manner that would – if jurisdiction was present – create a violation of an individual's ECHR rights, but in which the state was *not* deemed to have jurisdiction. *Al-Skeini* presupposed that the UK could have perpetrated an alleged interference with rights *not* deemed “relevant” to the situation of an individual, since otherwise there would have been no need to emphasise the divisibility of the rights.¹⁷² Presumably in that instance jurisdiction would not have been found. The Court therefore contemplates situations in which an exercise of authority and control creating potential violations of certain “irrelevant” rights is not found to fix the state with jurisdictional responsibility.

ECHR or ICCPR violations stemming from TEO imposition

The ICCPR is not directly applicable since it is not incorporated into domestic law, although it may nevertheless be justiciable, determined on a case by case basis.¹⁷³ The ECHR is the directly applicable Treaty as far as the UK is concerned, under the HRA. But the scope

¹⁷⁰ See *Smith v Ministry of Defence* [2014] AC 52. In *R(Al-Skeini) v Secretary of State for the Home Dept* [2008] 1 AC 153 the House of Lords rejected a submission that the presumption against the extra-territorial application of legislation would result in the non-applicability of the HRA where jurisdictional competence for ECHR purposes at Strasbourg would apply. That finding was followed by the Court of Appeal in *Sedar Mohammed and Others v Secretary of State for Defence* [2015] EWCA Civ 843, para 103.

¹⁷¹ Under *Al-Skeini v UK* (*supra* note 139) obligations in that situation are divisible (para 137); *Smith v Ministry of Defence* [2014] AC 52 applied *Al-Skeini*.

¹⁷² *Ibid*, para 137.

¹⁷³ Courts have recently shown a greater willingness to examine and interpret unincorporated treaties, especially in the human rights field: *Jones v The Ministry of the Interior (The Kingdom of Saudi Arabia)* [2005] 2 WLR 808; *R (European Roma Rights Centre) v. Immigration Officer at Prague Airport* [2005] 2 WLR 1, per Lord Steyn, paras 44-5, Baroness Hale, paras 98-100; *A v Secretary of State for the Home Department* [2005] 2 WLR 87, per Lord Bingham, paras 19,68.

of the ECHR in this respect is somewhat narrower than that of the ICCPR or UDHR: there is no equivalent in the ECHR of the right under Article 12(4) ICCPR, considered above, not to be arbitrarily deprived of the right to enter one's own country. The ECHR also does not contain a precise equivalent of Article 10 ICCPR which provides that "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person". It may also be noted that Protocol 4 ECHR, which provides a right to freedom of movement, has not been ratified by the UK.

Detention abroad resulting from TEO imposition would be likely to engage the right to liberty under Article 5(1) ECHR and Article 9 ICCPR. Detentions resulting from or associated with the imposition of TEOs could fall within one of the Article 5 or 9 exceptions, but it would appear that they could not do so *if* the UK was deemed to have ECHR and ICCPR jurisdictional competence in relation to rights relevant to the TEO subject's situation – of which Article 5 would clearly be one - since no exception covers executive detention on national security grounds.¹⁷⁴ If, contrary to the argument here, the detention was found instead to be the responsibility of the host state, the relevant exception would probably be Article 5(1)(f) which covers detention of "a person against whom action is being taken with a view to deportation or extradition". It will only cover lengthy detentions, following *Chahal*,¹⁷⁵ if during the detention deportation is actively being sought with due diligence.¹⁷⁶ It would, however, be arguable that if a lengthy detention occurred abroad that exception would not cover the situation, because the delay in allowing the TEO subject to enter the UK is not entirely consonant with the situation in which deportation is being actively sought, usually via negotiations as to assurances regarding treatment on return,¹⁷⁷ or while court proceedings challenging deportation or extradition are ongoing, since in relation to TEOs the factors causing the delay may be within the control of the UK government. If on the other hand the

¹⁷⁴ Following *Foka v Turkey* (App. No. 28940/09), judgment of 24 June 2008, if the detention was under the auspices of UK officials but only covered a period in an airport and then on a plane, Article 5 would be engaged due to the element of coercion, but if the applicant was arrested under s41 TA before being detained, the exception under Article 5(1)(c) would appear to apply.

¹⁷⁵ *Chahal v UK* (1996) 23 E.H.R.R. 413, para 113. In order to detain, deportation proceedings should be in being and it should be clear that they are being prosecuted with due diligence.

¹⁷⁶ See *R (on the application of Hardial Singh) v Governor of Durham Prison* [1984] WLR 704; *A and others v UK* (App. No. 3455/05), judgment of 19 February 2009, para 164.

¹⁷⁷ See *Othman v UK* (2012) 55 E.H.R.R. 1.

delay is caused by the TEO subject who is refusing to attend an interview abroad, it could still be argued that deportation is being actively sought.¹⁷⁸

The possibility of arrest and detention abroad flowing from TEO imposition also raises the possibility of Article 3 ECHR (or Article 7 ICCPR) treatment.¹⁷⁹ The Immigration Minister has stated that certain states where TEO subjects might be exposed to a risk of Article 3 treatment are not being approached to create agreements in respect of TEOs.¹⁸⁰ Ministers have also stated that if it was apparent that a particular individual faced a threat of torture in a third country, the Secretary of State should not make a TEO.¹⁸¹ The ECHR memo further stated that the practice of not depriving UK citizens of citizenship when they are not within the UK's jurisdiction if so doing would expose them to a real risk of treatment in breach of Articles 3 or 2 ECHR,¹⁸² would also be followed in respect of the imposition of TEOs.¹⁸³ But Turkey was mentioned as a possible host state for persons subject to TEOs. David Cameron has previously stressed the need for closer cooperation with Turkey in relation to the problem posed by returnees from ISIS-held territory who travel through Turkey.¹⁸⁴ The problem is that under a TEO such persons would probably have to be detained in Turkey. As *Liberty* has pointed out, Turkey's record on subjecting persons to Article 3 treatment has been criticised a number of times¹⁸⁵ by the UN Committee Against Torture.¹⁸⁶

Article 3 has both a procedural and a substantive aspect.¹⁸⁷ If serious allegations of ill-treatment are made, the investigation must be both prompt and thorough.¹⁸⁸ If due to the

¹⁷⁸ But the Strasbourg Court is not willing to extend the scope of the exceptions: in *Kurt v Turkey* (1998) 27 E.H.R.R. 373, para 122, it referred to "the fundamental importance of the guarantees contained in Article 5...to be free from arbitrary detention at the hands of the authorities", meaning that the exceptions should be narrowly construed. In *A and others v UK* (App. No. 3455/05), judgment of 19 February 2009, para 171, the Court stated: "If detention does not fit within the confines of the paragraphs as interpreted by the Court, it cannot be made to fit by an appeal to the need to balance the interests of the State against those of the detainee".

¹⁷⁹ Article 3 provides a guarantee against use of 'torture or inhuman or degrading treatment or punishment'.

¹⁸⁰ See note 166.

¹⁸¹ HL Deb, 20 Jan 2015, Col 1309.

¹⁸² Article 2 ECHR provides a right to life subject to certain exceptions.

¹⁸³ ECHR Memo (*supra* note 159), para 13.

¹⁸⁴ David Cameron and Ahmet Davutoglu, press conference in Turkey, 9.12.14 (available at <https://www.gov.uk/government/speeches/david-cameron-and-ahmet-davutoglu-press-conference-in-turkey> [last accessed 20.4.17]).

¹⁸⁵ See *Liberty's* Second Reading briefing on the Counter-Terrorism and Security Bill in the House of Lords January 2015, para 22.

¹⁸⁶ UN Committee Against Torture Report, Forty-fifth session, 1–19 November 2010, para 7.

¹⁸⁷ See e.g. *Silih v Slovenia* (App. No. 71463/01), judgment of 9 April 2009, [2009] ECHR 537.

situation in which the TEO subject remained detained abroad an eventual investigation into such allegations was delayed and hampered, meaning that essential evidence therefore could not be obtained, that in itself could constitute a breach of Article 3 (raised under the HRA on return) in procedural terms,¹⁸⁹ depending on resolution of the jurisdictional issue in the domestic courts.

If the UK is eventually found to have jurisdictional competence in respect of TEO subjects abroad, the state might therefore find itself complicit in the use of Article 3 (or even Article 2) treatment in Turkey (or a state with a similarly doubtful record on such treatment) against a TEO subject in detention. The possibility that a person subject to a TEO might be detained abroad and suffer Article 3 treatment there is reflected in s7 of the 2015 Act which provides for issuing of permits even without an application for them, in urgent situations;¹⁹⁰ the urgency could arise due to the need to ensure that Article 3 was not breached abroad. But obviously that assumes that the person in question is able to communicate effectively with British authorities while in detention in another state.

Conclusions

TEOs are not only based on the model of executive non-trial-based measures that both control orders and TPIMs share, they are also part of the counter-terror weaponry which there is in reality a strong reluctance to deploy.¹⁹¹ Measures on this model, currently manifesting themselves in the form of a strengthened version of TPIMs, have nevertheless secured a

¹⁸⁸ *Al-Skeini v UK* (GC) (App. No. 55721/07), judgment of 7 July 2011 at 151, 163-4, 171-3; *Al-Nashiri v Poland* (App. No. 28761/11), judgment of 24 July 2014, at para 486.

¹⁸⁹ As in *Al-Nashiri v Poland* (note 188).

¹⁹⁰ See *supra* note 74.

¹⁹¹ As regards control orders, see David Anderson “Control Orders in 2011” Seventh Report March 2012, at 5. By the end of 2011 9 control orders were in force. 52 persons had been subjected to them between 2005-11 (at 4). By 2013 use of TPIMs was “Withering on the vine as a counter-terrorism tool of practical utility”: Joint Committee on Human Rights, “Post-legislative scrutiny: Terrorism Prevention and Investigation Act 2011” Tenth Report of Session 2013-2014, HL 113 HC 1014, January 2014, at 5. Despite their strengthening via CTSA Part 2, only 1 TPIM was in force in mid-2016: “Only one Tpm terror control order is in place in Britain amid 'severe' threat level”: the Telegraph 28.7.16; see *EB v Secretary of State for the Home Department* [2016] EWHC 137 (Admin). But between 1.6.16–31.8.16 6 notices came into force, 5 in respect of British citizens: Memorandum to the Home Affairs Committee: Post-Legislative Scrutiny of the Terrorism Prevention and Investigation Measures Act 2011, October 2016, Cm 9348, para 37.

minor but persistent role, as part of the established and normalised counter-terror tool-kit.¹⁹² TEOs are less likely to establish such a role for themselves, but may nevertheless persist, possibly with a view to meeting the risks created by a greater influx of returnee FTFs in future. They may join other counter-terror measures that have been introduced but not utilised post 9/11. A pertinent example is provided by derogating control orders, introduced under the Prevention of Terrorism Act 2005, but never actioned. Similarly, the Enhanced Terrorism and Prevention Measures Bill 2012 provides for measures similar to “heavy touch” control orders, which has so far merely remained on the books.¹⁹³

The attempted reconciliation between TEOs and human rights law discussed here is much more problematic than it is in relation to TPIMs. This article has pointed out that three methods have been explored to reconcile post-9/11 liberty-invading non-trial-based measures with international human rights law: reliance on a derogation; reliance on recalibrations of rights; and now reliance on lack of jurisdictional competence. While TPIMs are extraordinary measures that create some tensions, especially in their newly strengthened form,¹⁹⁴ with human rights, their appearance of constitutionality has some substance which does not rely on rights’ recalibration.¹⁹⁵ Presentation of the TEO scheme to Parliament as ECHR-compatible on the basis of lack of jurisdictional competence, and as acceptable in terms of international human rights law generally, also created an appearance of constitutionality, which, as Dyzenhaus has argued, may be more dangerous than declaring its complete absence.¹⁹⁶ But any veneer of constitutionality created is thin indeed, as discussed, in contrast to the position of TPIMs, influenced from their inception by the process of human rights’ tempering undergone by control orders,¹⁹⁷ to which their recent revival as a niche counter-terror measure of practical utility can partly be attributed. If a continuum between counter-terror

¹⁹² TPIMA has been renewed until 2021: see the Terrorism Prevention and Investigation Act 2011 (Continuation) Order 2016 made under s21 CTSA, which extended the Secretary of State’s TPIM powers, due to expire on 14.12.16, for a further five years, until 13.12.21.

¹⁹³ See Helen Fenwick “Designing ETPIMS around ECHR Review or Normalisation of ‘Preventive’ Non-Trial-Based Executive Measures?” (2013) 76(5) MLR 877–909.

¹⁹⁴ See *Secretary of State for the Home Department v AP* [2011] 3 WLR 53 in which it was found that in certain circumstances the imposition of forced relocation (see note 104) could create a breach of Article 5 ECHR.

¹⁹⁵ See Fenwick and Phillipson, note 197

¹⁹⁶ David Dyzenhaus, *The Constitution of Law: Legality in a time of emergency* (Cambridge: CUP, 2006) 2-3, referring in particular to adherence to the rule of law. See also David Dyzenhaus “States of Emergency” in M Rosenfeld and András Sajó *The Oxford Handbook of Comparative Constitutional Law* (Oxford: Oxford University Press 2012).

¹⁹⁷ See: Helen Fenwick and Gavin Phillipson, ‘Covert derogations and Judicial Deference: Redefining Liberty and Due Process rights in Counterterrorism law and beyond’, (2011) 56(4) McGill L.J. 1-54; Clive Walker ‘Keeping control of terrorists without losing control of constitutionalism’ (2007) 59(5) Stan.L.Rev.1395.

rhetoric and reality can be envisaged, TEOs therefore sit more towards the former end than do TPIMs (and “light-touch” control orders).

As a result, the relevance of TEOs to the current threat from FTF returnees is clearly in doubt. Their complete lack of deployment so far appears to be linked to practical problems,¹⁹⁸ the uncertainty as to the question of ECHR and ICCPR jurisdictional competence on which the exclusion aspect of the scheme rests, and the lack of agreements with other states. The potential role of TEOs appears to have been overtaken by the recent successful deployment of precursor terrorism offences to combat the threat posed by returnee FTFs.¹⁹⁹ TEOs are therefore likely to remain un-used or under-used, while still retaining their capacity to damage the UK’s reputation in terms of the moral legitimacy of its use of state power against terrorism.²⁰⁰ If TEOs are ever deployed to combat the threat from ISIS returnees, the legal uncertainties and gaps inherent in the scheme may lead to protracted court action reminiscent of that which arose in the wake of the introduction of control orders.²⁰¹ As discussed, it is the exclusion aspect of TEOs, not the “managed return” one, that could potentially attract such litigation. It is concluded therefore that the benefits of the “managed return” aspect of TEOs in terms of enhancing security are arguably being rendered of less utility by their exclusion aspect due to the jurisdictional ECHR barrier to their use, as discussed. There is therefore a strong argument for amendment of the CTSA TEO provisions to reflect their “managed return” aspect only, given that in their current form their role, recalling that played by derogating control orders and ETPIMs, may be said to form part of a rhetorical counter-terror effort, rather than a real one.

The introduction of TEOs thus appears to owe more to the need for determined or belligerent rhetoric in relation to ISIS and similar groups, than to a rational evaluation of the needs of security. They appear to represent an impotent expression of the frustration felt by Western democracies - also evident in measures such as the Strengthening Canadian

¹⁹⁸ *Supra* note 9.

¹⁹⁹ *Supra* note 111. See also David Anderson (December 2016), *supra* note 12, para 9.22, and C Walker Annex 2 of the Report, para 13, and J. Blackbourn and C. Walker, “Interdiction and Indoctrination: the Counter-Terrorism and Security Act 2015” (2016) 79 MLR 840-870, 842, who find that criminalisation “remains a vibrant tactic”.

²⁰⁰ The Amnesty International Report, 17.1.17 (*supra* note 131) accused EU states in general of a damaging lack of allegiance to maintenance of human rights’ standards in the face of rapid securitisation (pp 6 and 19); it instanced TEOs in the UK as an example of a disproportionate measure (p 53).

²⁰¹ See Fenwick and Phillipson, *supra* note 197; see also Lucia Zedner on this point in respect of citizenship-stripping (note 42), 16. In this respect TEOs could trace a path similar to that already traced by control orders.

Citizenship Act 2014 - at the prospect of allowing nationals suspected of wanting to participate in or facilitate the murder of other nationals on religio-political grounds to be received within their borders. But ironically, some of the legal expressions of that frustration in democracies, of which TEOs offer one example, currently appear to be at odds with the UN-promoted notion of a global struggle against terrorism.